Volume 1, No. 6, Pages 1041 to 1267, December 8 - December 19, 1986.

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Citation Form: 1 FCC Rcd 1 (1986)

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

A Closed Circuit Test of the
National-Level Interconnecting
Systems and Facilities and
Program Origination Channels
of the Emergency Broadcast
System.

**ORDER**

**Adopted: November 26, 1986 Released: December 9, 1986**

By the Managing Director:

1. The Commission has received a request from the Federal Emergency Management Agency and the White House Communications Agency to conduct a Closed Circuit Test of the National-Level interconnecting systems and facilities of the Emergency Broadcast System (EBS) during the week of December 15, 1986.

2. This request has been coordinated with the major radio networks by Mr. Tom McGinn of CBS.

3. Coordinated arrangements have been made with the White House Communications Agency, the Federal Emergency Management Agency, the major Radio Broadcast Networks (ABC, AP Radio, CBS, CNN, MBS, NBC, NPR, United Stations and UPI Audio) and the American Telephone and Telegraph Company (AT&T).

4. Accordingly, pursuant to authority delegated to the Managing Director in his capacity as Director, National Security and Emergency Preparedness, IT IS ORDERED that a Closed Circuit Test of the EBS be conducted during the week of December 15, 1986, in accordance with Section 73.962 of the Rules.

5. Authority for the adoption of this action is contained in Section 1, 4(i), 4(o), and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 85-124**

In the Matter of

Determination of Interstate and
Intrastate Usage of Feature Group A
and Feature Group B Access Service

## SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

**Adopted: October 21, 1986; Released: December 9, 1986**

By the Commission:

### I. Introduction

1. In April 1985, we convened a Joint Board in this docket in order to develop a comprehensive solution to certain longstanding problems relating to the measurement and verification of interstate and intrastate usage of Feature Group A (FGA) and Feature Group B (FGB) access services by interexchange carriers (IXCs) for purposes of applying interstate and intrastate access tariffs and charges to this traffic.[1] This Joint Board solicited the views of interested parties on these matters, and those comments have now been filed.[2] By this Supplemental Notice of Proposed Rulemaking we are expanding the scope of this Joint Board's mandate to include consideration of related separations issues. To this end, as specified below, we request comments from interested parties on the jurisdictional separations issues associated with a decision regarding measurement of intrastate and interstate FGA and FGB usage. We request that the Joint Board review these comments and address the relevant separations issues concurrently with the other matters now before it in its recommendations to the Commission concerning a permanent solution to the jurisdictional measurement problem.

### II. Background

2. The FGA and FGB access arrangements provided to the IXCs by the local exchange carriers (LECs) are used to carry both interstate and intrastate traffic on a non-segregated basis. Although the LECs need information as to the relative amounts of interstate and intrastate FGA and FGB traffic carried by their customers for access charge billing and other purposes, the LECs generally lack the technical ability to identify or measure such usage themselves. This is due to the fact that FGA, and for the most part, FGB, access arrangements do not provide automatic number identification (ANI) capability, without which the originating number of a call transiting these types of access lines cannot be determined and thus its jurisdictional nature cannot be determined.[3]

3. An available source of data bearing on this determination is the call detail information maintained by the OCCs. This call detail, however, does not reveal the actual jurisdictional nature of each call. Rather, the OCC can only use this information to determine what portion of its traffic carried over FGA and FGB access lines without ANI enters its network in the states in which the called stations are situated and what portion is routed from the points of entry to called stations in different states.

4. The inability to identify the jurisdictional nature of this traffic has led to disputes between the LECs and IXCs, as to the proper methods to be used to "determine" and verify the amount of intrastate and interstate FGA and FGB traffic. These matters have previously been brought before this Commission through access tariff filings attempting to address the measurement problems, as well as by a Petition for Declaratory Ruling filed by MCI Telecommunications Corporation (MCI). Our examination of the tariffs and the MCI petition ultimately led to establishment of this Joint Board.

5. The MCI petition, filed on September 11, 1984, asked this Commission to find that by virtue of several orders in Phase I of our investigation of the initial access tariffs,[4] this Commission had effectively preempted state and local regulation of the manner of determining the intrastate switched access usage over FGA and FGB access lines for purposes of intrastate access charge billing. MCI also asked us to direct the LECs to follow the procedures in Sections 2.3.14 and 2.3.15 of the National Exchange Carrier Association's (NECA's) interstate switched access tariff[5] developed in accordance with orders in the original access tariff proceeding. MCI claimed that several states had prescribed or were considering adopting methods of measuring intrastate access usage that diverged sharply from the NECA tariff provisions developed pursuant to the Commission's guidance in its *April 27 Tariff Order*. In particular, MCI objected to: 1) the imposition of auditing requirements under state tariff, or as a condition of state certification, and 2) state prescription of the Entry/Exit Surrogate (EES) method for estimating intrastate usage.[6] MCI also asked this Commission to "approve", on an interim basis, the various "allocational factors" then being used by the OCCs to adjust their jurisdictional usage projections to account for the existence of "false" intrastate traffic, pending Commission establishment of a uniform, industry-wide allocation factor that would be applied until the completion of equal access conversion.[7]

6. In ruling on the MCI petition,[8] we declined either to require the LECs to adhere to the procedures in the NECA access tariff for determining usage levels of intrastate FGA and FGB access services or to prohibit the LECs and state authorities from imposing reasonable auditing or verification requirements as a condition of obtaining intrastate FGA and FGB access. Moreover, we found that EES measurement procedures were not unreasonable, and that the EES method of jurisdictional determination appeared, in fact, to be a more accurate basis for jurisdictional measurement than the method described in NECA tariff Section 2.3.14. We concluded that interstate usage, should, at least on an interim basis, be determined in accordance with the EES method, and directed the LECs to incorporate revisions to that effect in their interstate switched access tariff filings. We also recommended use of the EES approach by the states[9] and declined to approve OCC allocation factors to adjust for false intrastate traffic.[10]

7. By its terms the *EES Order* set out a recommended interim solution to these traffic measurement problems. The *EES Order* recognized, however, the need to develop, through the cooperative efforts of federal and state regulators, a permanent, comprehensive solution for allocating this access traffic between the respective jurisdictions. The Joint Board in this docket was established to perform that task.[11]

### III. Discussion

8. The issue presently before the Joint Board concerns the distribution of FGA and FGB access minutes between the interstate and intrastate jurisdictions for access charge billing. To the extent the jurisdictional allocation of the revenues associated with FGA and FGB service depends upon this distribution of minutes, the method of jurisdictional determination has implications for the jurisdictional assignment of the FGA and FGB service costs associated with those minutes.[12] Moreover, it is important for the interstate jurisdiction to ensure that these costs are being properly allocated between the jurisdictions so that the charges for FGA and FGB interstate access services are set at levels that properly recover the costs associated with the provision of such services. In the *EES Order*, we acknowledged the importance of the measurement of interstate and intrastate usage of FGA and FGB services for purposes of "cost separation [under Part 67 of the Commission's Rules] in order that revenue burdens may be equitably distributed," as well as for access charge billing.[13]

9. In establishing this Joint Board, however, we – like MCI in its petition seeking preemption – focused solely on the revenue/billing aspect of the problem, and directed the Joint Board to examine the appropriate method of calculating interstate and intrastate usage of FGA and FGB switched access service "for purposes of applying access charges."[14] The Joint Board tailored its request for comments on the issues referred to it accordingly, and did not address, or ask commenting parties to address, the related separations issues. Some of the commenters did, however, note this omission, arguing that it would be inappropriate to consider jurisdictional measurement issues as they relate to cost recovery without at the same time examining and formulating recommendations on the underlying separations issues.[15]

10. Because we believe that both the cost allocation and revenue recovery aspects of the jurisdictional measurement issue must be addressed as part of any uniform, comprehensive solution to the problem of measurement for billing non-premium access service traffic, we are now expanding the scope of this proceeding and requesting comments on the jurisdictional separation issues. Pursuant to the requirements of Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), we also seek a recommendation from the Joint Board on this matter. Furthermore, because we also believe that the revenues collected in one jurisdiction for a particular service should track the costs assigned to the jurisdiction for that service, we tentatively conclude that whatever method is used to allocate this traffic between jurisdictions for purposes of access charge billing should also be used for purposes of allocating the traffic-sensitive costs[16] associated with providing FGA and FGB access services between the interstate and intrastate jurisdictions.[17]

11. We ask interested parties to comment generally upon the separations implications of the jurisdictional measurement of FGA and FGB traffic. LEC comments should describe the procedures that are currently used to measure FGA and FGB access for separations purposes. All parties are encouraged to recommend measurement methods that should be used, to comment upon our tentative conclusion that the same measurement method should be used for both separations and access charge billing purposes, and to recommend changes in the Separations Manual, 47 C.F.R. Part 67, to reflect the proposed measurement techniques. Comments should be filed no later than 30 days from release of this order and reply comments no later than 60 days from release of this order.

### IV. Ordering Clauses

12. Accordingly, IT IS ORDERED, that comments on the issues discussed above are to be filed with the Secretary, Federal Communications Commission no later than January 14, 1987, and replies no later than February 13, 1987, and that all parties filing such comments and reply comments are to serve copies on the Joint Board members and staff listed in Attachment A.

13. IT IS FURTHER ORDERED, that the Joint Board in CC Docket No. 85-124 shall consider the issues raised in this Supplemental Notice and the public comments filed in response and submit recommendations to this Commission on these matters, along with the other issues before this Joint Board.[18]

14. IT IS FURTHER ORDERED that, for purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission staff that addresses the merits of the proceeding. (State Commissioners and staff members will be treated as FCC Commissioners and staff for purposes of the *ex parte* rules.) The rules and procedures governing *ex parte* contacts concerning the separations issues which we are referring to the Joint Board are as set out in the Notice of Proposed Rulemaking establishing this Joint Board.[19]

15. Pursuant to Section 605(b) of the Regulatory Flexibility Act (Act), IT IS CERTIFIED that Sections 603 and 604 of the Act do not apply because the Commission has determined that local exchange carriers do not come within the Regulatory Flexibility Act's definition of a small entity.[20] 5 U.S.C. §§ 603, 604, 605(b). To the extent that the interexchange carriers are affected by the Commission's decisions in this proceeding, we HEREBY CERTIFY that these rules will not have a significant economic impact on a substantial number of small entities. This further Notice of Proposed Rulemaking does not propose any measures which would impose additional costs on carriers. While we do not believe that this proceeding comes within the requirements of the Regulatory Flexibility Act, we will give careful attention to arguments concerning the administrative or other burdens on small

carriers associated with possible measures for resolving these issues. We ask the Joint Board to consider these issues in developing its recommendations as well.

16. IT IS FURTHER ORDERED that pursuant to Section 220(i), the Secretary shall serve a copy of this Further Notice of Proposed Rulemaking on each State Commission.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

## ATTACHMENT A

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## FOOTNOTES

[1] In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, CC Docket No. 85-124, Notice of Proposed Rulemaking and Order Establishing a Joint Board, FCC 85-196 (released Apr. 25, 1985), 50 Fed. Reg. 18537 (1985).

[2] CC Docket No. 85-124, Order Inviting Comments, FCC 85-570 (released Oct. 28, 1985), 50 Fed. Reg. 45841 (1985). Comments were due on November 27, 1985, and reply comments on December 16, 1985.

[3] ANI capability is generally available with the Feature Group C access services utilized by American Telephone and Telegraph Company (AT&T), with FGD connections in end offices

converted to equal access, and with those FGB access services that are implemented at an end office. This measurement problem is, therefore, largely confined to those IXCs other than AT&T, referred to as "other common carriers" (OCCs), receiving non-premium access connections.

[4] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082 (1984); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC No. 84-188 (released Apr. 27, 1984)(*April 27 Order* ), 49 Fed. Reg. 19821 (1984).

[5] Under those procedures, the OCC customer ordering FGA and FGB access services essentially designated the percentage of the access lines it was ordering which was intended for intrastate use and the percentage of those lines intended for interstate use and the LEC used that split for billing purposes.

[6] Under the EES method of jurisdictional determination, calls which enter an OCC network in the same state in which the called station is located are deemed to be intrastate, and calls which terminate in a different state than their OCC point of entry are considered interstate.

[7] "False" intrastate traffic refers to those calls that appear to be intrastate under the EES method of jurisdictional determination, but that actually originate and terminate in different states. This phenomenon is said to involve two types of calls: 1) calls which reach the IC network in the state of termination via interstate private line links, "leaky" PBXs or other interstate interconnections which are invisible to the OCC network such that the call appears to be intrastate; and 2) cross-border calls made in local calling or extended service areas which straddle state lines such that the call enters the OCC network in a state different from that in which the calling party is located.

[8] MCI Telecommunications Corporation, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, FCC 85-145 (released Apr. 16, 1985)(*EES Order* ), *recon. denied* Memorandum Opinion and Order, FCC 85-595 (released Nov. 13, 1985).

[9] Recognizing the imperfection of the EES method, however, we suggested that states consider permitting OCCs to use adjustment factors or other measurement methods to determine the volumes of interstate and intrastate traffic in areas where such approaches would produce more accurate, easily verifiable results.

[10] With regard to the verification issues, we also recognized the legitimate interest of the states and LECs in assuring the accuracy of the OCC usage estimates, and concluded that it would not be unreasonable to permit the LECs to require that their OCC customers keep records of the call detail on which they base the jurisdictional allocation of their traffic and to make those records available as reasonably necessary for verification. At the same time, we did, however, caution against verification requirements that were discriminatory, unduly burdensome, or intrusive on OCC operations.

[11] Subsequent to the *EES Order*, several aspects of the jurisdictional measurement and verification provisions included in the LEC switched access tariffs filed on July 2, 1985, were challenged in petitions seeking rejection or suspension of those tariffs. Because some of the same issues raised in those petitions are before this Joint Board, the Common Carrier Bureau has declined to address the challenged measurement and verification tariff provisions in the access filing proceeding pending completion of this Joint Board proceeding. *See* In the Matter of Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, Order Designating Issues for Investigation, Mimeo No. 4963 (released June 9, 1986). The Bureau, however, indicated in that designation order that any issues not addressed and resolved by the Joint Board would be designated for investigation by the Bureau at a later date. *Id.* at para. 5.

[12] Treatment of access traffic as intrastate or interstate for billing purposes without regard to the separation of the associated costs would conflict with the fundamental principle that jurisdictional separations should be based on usage. *See* 47 C.F.R. § 67.1(c).

[13] *EES Order* at para. 4 and note 7.

[14] *See supra* note 1.

[15] *See, e. g.*, Comments of National Telephone Cooperative Association and The Organization for the Protection and Advancement of Small Telephone Companies.

[16] Because non-traffic sensitive (NTS) local exchange plant costs are currently assigned to the jurisdictions according to a fixed percentage which does not vary with relative usage, the jurisdictional measurement issues now before us do not generally affect the allocation of NTS costs. *See generally* Decision and Order, In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984). That percentage is being phased-in to a uniform nationwide 25% interstate allocation factor over an eight year period beginning this year.

[17] We are not expressing any opinion on the choice of a measurement method. That issue is already before the Joint Board with respect to the assessment of access charges.

[18] This action is taken pursuant to Sections 1, 4(i) & (j), 201-205, 220, 403, and 410 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i) & (j), 201-205, 220, 403 and 410.

[19] *See supra* note 1, at para. 9.

[20] This definition excludes any business that is dominant in its field of operation because it exercises a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. 13 C.F.R. § 121.3(c). Local exchange carriers, even small ones, have a dominant monopoly position in their local service area because they are the sole providers of ubiquitous switched access to the local exchange.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Sections
0.416, 0.445, and 1.14
of the Commission's Rules

**ORDER**

**Adopted: November 14, 1986 Released:December 9, 1986**

By the Commission:

1. By this Order we amend our rules to change the name of the Commission's official published record of decisions, the *FCC Reports*, to the *FCC Record*. In addition, we expand the contents of this document to reflect its increased role in our public information program. Finally, we amend O.445(a) of the rules to indicate that only adjudicatory opinions and orders are mailed to the parties.[1]

2. Certain decisions of the FCC are currently published in the *FCC Reports*. This document now serves as the official citable source to Commission decisions. *See* 47 C.F.R. §1.14. This publication is intended to serve as an archival source of the Commission's actions in conformance with the section 4(m) mandate of the Communications Act of 1934.[2] The *FCC Reports* also complements the mandatory publication of certain Commission actions in the *Federal Register* as required by the Administrative Procedure Act. *See* 5 U.S.C §§552(a) and 553(b).

3. Because of budgetary constraints, in recent years the *FCC Reports* has contained only documents with precedential or historical significance. Today, many decisions of the Commission are available only in the *Federal Register* or private sector publications. In response to the recent Gramm-Rudman-Hollings budget cuts, the Commission further limited the *FCC Reports* to documents published in summary form in the *Federal Register* and not published in a "nationally distributed, comprehensive reporter of FCC decisions."[3]

4. The new official source of Commission decisions--the *FCC Record* --will provide the public with a comprehensive, timely, and cost effective source of FCC actions.[4] The *FCC Record* will contain all texts released to the public on a daily basis through the Office of Congressional and Public Affairs. In addition, it will contain certain public notices, speeches, and staff papers. The publication will be mailed to subscribers every two weeks in soft cover form.[5] Each biweekly edition will also contain a table of contents and an index based on the Commission's rules as set out in the Code of Federal Regulations (a consolidated index will be published on a periodic basis).

5. Because of the expense of mailing opinions and decisions directly to the parties, we are amending §0.445(a) of the rules to state that only adjudicatory opinions and orders are mailed to the parties. Parties and other interested members of the public will continue to have access to Commission opinions and orders through several sources. The "Daily Releases" from OCPA, which include all documents made available to the public, are available for purchase from private contractors or for viewing and copying in the FCC library or our field offices. Decisions may also be viewed in the Public Reference Room at our Washington headquarters. Documents are also available in the *Federal Register* (in summary form), and, in the near future, in the new *FCC Record*.

6. Prior notice and public comment procedures are not required because this action pertains to procedure and practice. *See* 5 U.S.C. §553 (b)(3)(A).

7. Because a notice of proposed rule making is not required, an initial and final regulatory flexibility analysis is not required. *See* the Regulatory Flexibility Act of 1980, 5 U.S.C. §§603 and 604.

8. ACCORDINGLY, IT IS ORDERED, pursuant to authority provided provided by sections 4(i), 4(j), 4(m), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 154(m), and 303(r), Parts 0 and 1 of the Commission's Rules are amended as shown below.

9. IT IS FURTHER ORDERED that this Order is effective upon publication in the *Federal Register* in order to allow the Commission to immediately provide the public with a more timely and cost effective source of its decisions.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**APPENDIX**

**Rule Changes**

Parts 0 and 1 of the Code of Federal Regulations are amended as follows:

PART 0 Commission Organization

1. The authority citation for Part O continues to read:

Authority: 47 U.S.C. 154, 303, unless otherwise noted. Implement; 5 U.S.C. 552, unless otherwise noted.

2. Section 0.416 is revised in its entirety to read as follows:

**§0.416 The Federal Communications Commission Record.**

Texts adopted by the Commission or a member of its staff on delegated authority and made available to the public through the Office of Congressional and Public Affairs are published in the FCC Record. The FCC Record is published biweekly in pamphlet form. The pamphlets are available on a subscription basis from the

Superintendent of Documents. Each biweekly pamphlet contains a table of contents and current index. A consolidated index is published on a periodic basis.

3. Section 0.445 is amended by revising paragraphs (a), (b), (d), (e), and (f), to read as follows:

**§0.445 Publication, availability and use of opinions, orders, policy statements, interpretations, administrative manuals, and staff instructions.**

(a) Adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority, are mailed to the parties, and as part of the record, are available for inspection in accordance with §0.453 and §0.455.

(b) Texts adopted by the Commission or a member of its staff on delegated authority and made available to the public through the Office of Congressional and Public Affairs are published in the FCC Record. Older materials of this nature are available in the FCC Reports. In the event that such older materials are not published in the FCC Reports, reference should be made to the Federal Register or Pike and Fischer Radio Regulation.

(c) * * *

(d) Formal policy statements and interpretations designed to have general applicability and legal effect are published in the Federal Register, the FCC Record, or Pike and Fischer. Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Record or Pike and Fischer. General statements regarding policy and interpretations furnished to individuals, in correspondence or otherwise, are not ordinarily published.

(e) If the documents described in paragraphs (a) through (d) of this section are published in the Federal Register, the FCC Record, or Pike and Fischer Radio Regulation, they may be relied upon, used or cited as precedent by the Commission or private parties in any manner. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to the rationale set forth in a recent document that is pending publication if the requirement or policy to which the rationale relates is contained in a published document or if actual notice of that requirement or policy has been given.

(f) The Federal Register, the FCC Record, and Pike and Fischer Radio Regulation are indexed. If the documents described in paragraphs (a)-(d) of this section are not published, they are neither indexed nor relied upon, except as provided in paragraph (e) of this section.

Part 1 Practice and Procedure

4. The authority citation for Part 1 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 145, 303; Implement . 5 U.S.C. 552, unless otherwise noted.

5. Section 1.14 is revised to read as follows:

**§1.14 Citation of Commission documents.**

The appropriate reference to the FCC Record shall be included as part of the citation to any document that has been printed in the Record. The citation should provide, the volume, page number and year, in that order (e.g., 1 FCC Rcd. 1 (1986). Older documents may continue to be cited to the FCC Reports, first or second series, if they were printed in the Reports (e.g., 1 FCC 2d 1 (1965)).

**FOOTNOTES**

[1] By a separate decision we will be acting on Petitions for Reconsideration to our decision to publish summaries of rule making documents and policy statements in the *Federal Register*. *See* note 3 *infra*. To the extent that the rules discussed herein impact on the issue of *Federal Register* summaries, our Memorandum Opinion and Order on that subject should be reviewed.

[2] Section 4(m) reads: "The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without further proof or authentication thereof." 47 U.S.C. §154(m).

[3] *See* Commission Order of February 21, 1986, FCC 86-86, 51 F.R. 7443 (March 4, 1986).

[4] Documents released to the public prior to October 1, 1986 may be cited to the *FCC Reports*, first or second series.

[5] The *FCC Record* will be available by subscription from the Superintendent of Documents for $173. New subscribers should direct inquiries to the Government Printing Office, Superintendent of Documents, Washington, D.C. 20402-9371 (202) 783-3238. Current subscribers to the *FCC Reports* have been or will be contacted with details on how to switch to the FCC Record.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Richmond, Virginia)

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 14, 1986 Released: December 9, 1986**

By the Commission:

**Introduction**

1. Before the Commission is the Application for Review [1] filed by Citizens for Public Radio, Inc ("Citizens") of the February 28, 1986, action by the Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, denying acceptance of Citizens' Petition for Rule Making and Request for Order to Show Cause. Union Theological Seminary of Virginia ("Union") filed an Opposition to Application for Review, and Citizens filed a reply.[2]

**Background**

2. Citizens filed its rule making petition requesting that commerical FM Channel 293, Richmond, Virginia, be reserved for noncommercial educational use and that the license of Union for that channel be modified to specify noncommercial educational operation. Citizens references a proposed sale of the station and expresses concern that the transferee may operate with a commercial format. [3] The Branch Chief ruled that Citizens' request was not acceptable and returned the petition by letter. Citizens now asks the Commission to either vacate the Branch Chief's action and issue a Notice of Proposed Rule Making and Order to Show Cause or to instruct the Branch Chief to do so.

3. The dismissal letter noted that, although not required to operate noncommercially, Union has chosen a noncommercial educational format for Station WRFK-FM and that absent an interest by Union in reserving its channel, the Commission will not require noncommercial educational service. The letter referenced two applications proposing noncommercial educational service on Channel 205 as a Class B station, a pending application for Channel 209A, [4] existing noncommercial educational service provided by Station WDCE(FM) on Channel 211A, and the availability of newly allotted Channel 266A, all of which then offered prospective noncommercial educational service to the Richmond area. [5]

4. Citizens first argues in its Application for Review that the staff failed to cite authority when holding that Commission policy is to deny a request to reserve a commercial channel absent consent of the incumbent licensee. Alternatively, Citizens contends that if the staff was forging a new policy, the Commission may appropriately review the action in light of the circumstances here.

5. Next, Citizens questions the availability of alternative opportunities to provide adequate noncommercial educational service to the Richmond area. It notes that the licensee of television Station WTVR, Channel 6, refuses to permit Central Virginia Educational Television Corporation ("Central"), an applicant for Channel 205, to collocate its proposed transmitter with Station WTVR's facilities and that absent co-location, any noncommercial educational station operating within the reserved portion of the FM band will be unable to provide coverage to greater Richmond and Central Virginia comparable to that currently provided by Station WRFK. In this regard, Citizens expresses doubt whether any applications filed for Channel 205 are grantable due to Channel 6 interference and, accordingly, whether the staff's reliance on them for potential noncommercial educational service is appropriate.

6. Citizens asserts that, given the existing and proposed facilities, neither Station WDCE nor a proposed station on Channel 209A could provide the same coverage to greater Richmond and to Central Virginia now provided by WRFK. It references prior Commission rulings that the provision of wide area coverage by noncommercial educational stations is a major benefit of reservations. In this regard, Citizens notes that Section 396(a)(6) of the Communications Act of 1934, as amended, contains language requiring the Federal Government to support a national policy which most effectively makes public broadcast services available to all citizens. In light of this precedent, Citizens maintains that the staff's reliance on limited coverages from other stations as a substitute for Station WRFK's wider coverage is erroneous.

7. Finally, Citizens argues that foreclosing public notice of its petition did not allow for consideration of the merits of its proposals or for public comments and the creation of a thorough record. According to Citizens, it is not clear how the public interest could be disserved or Union harmed by consideration of comments in response to a notice. Citizens asserts that acting without notice or public participation, especially where the interests of noncommercial educational listeners in suburban Richmond and central Virginia could be adversely affected, can be justified only by compelling reasons.

8. In its Opposition, Union argues that the Commission was not required to reach the ultimate merits of Citizens' request but was merely required to make a threshhold determination as to whether Citizens's claims were sufficient and to set forth a rational statement of the reasons for denying the petition. Union claims that while Citizens urges the Commission to require the continuation of a noncommercial educational programming format, Commission policy is to the contrary and that reservation of Channel 293 is not necessary to ensure continued access to such programming in Richmond. Union asserts that service at least equivalent to that of Station WRFK can be provided on Channel 205 and suggests that Section 316 of the Act and Section 1.87 of the Commission's Rules provide authority to require Station WTVR to cooperate with Central in minimizing interference as well as its consent to allow Central to collocate on its existing tower. Further, Union notes that it has no present intention to cease noncommercial educational programming until the Commission grants Central's license application or an

equivalent one. Union disputes Citizens' contention regarding Section 396(a)(6) of the Act. It asserts that the referenced Section is a mere Congressional statement of support for a national policy which will most effectively make public broadcast services available to all and a recognition that the Corporation for Public Broadcasting is a means of fostering that policy.

9. In reply to Union, Citizens maintains that reservations reflect Commission compliance with Congressional instructions as reflected in Section 396(a) regarding the growth and development of public broadcasting and that reservation of Channels 201-220 [6] is inadequate for that purpose in the Richmond situation. Citizens also contends that until the Commission actually grants Central's application for Channel 205, there is no basis to deny or defer Citizen's request, which sets forth the best way to ensure continued mandated service to greater Richmond and central Virginia.

**Discussion**

10. The Commission finds, for the reasons outlined below, that the public interest would not be advanced by initiation of a rule making proceeding as requested by Citizens. Union has operated on Channel 293 in Richmond since 1957 with a noncommercial educational format although not obligated to do so by the nature of the channel or by the terms of its license. It now desires to assign its license to a prospective licensee that may wish to operate as a commercial station. [7] In the instant situation Union has voluntarily operated its station with a noncommercial educational format. Because neither its channel nor its license are reserved, it is free at any time to change to commercial operation without our prior notice or approval. It would be inequitable to now, in effect, penalize Union for having previously chosen to operate as a noncommercial station. Moreover, to do so would discourage other similarly situated licensees desiring to provide noncommercial educational programming. Absent unusual and compelling circumstances, not present here, the Commission finds no public interest benefit in discouraging licensees from voluntarily offering noncommercial service and sees no benefit in raising uncertainty concerning the future of such operations.

11. As to Citizens' assertion that there must be compelling reasons to justify agency action without notice or public participation, especially where the interests of the audience of Station WRKF could be adversely affected, there is no requirement that every request be offered for public comment. Indeed, Section 1.401(e) of the Commission's Rules expressly provides for the dismissal of rule making petitions without notice and comment procedures. Specifically, a petition may be dismissed ".which plainly does not warrant consideration" Here, although Citizens argues to the contrary, the Commission is aware of no instance where it had previously reserved a channel for noncommercial educational use despite a lack of interest by an incumbent licensee. [8] Further, Citizens itself fails to cite examples of Commission action reserving channels under such a circumstance. [9] We therefore uphold the dismissal letter.

12. Regarding Citizens' argument concerning the potential availability of alternative opportunities for noncommercial educational service, those possibilities were of no decisional significance in the initial dismissal action. We recognize that there are currently no other Richmond stations that replicate the service now provided by Station WRFK. However, as the dismissal letter mentioned, various possibilities exist for such service. See para. 3 *supra*. Each of these proposals can he accomplished provided an accommodation is reached to collocate with the Richmond Channel 6 station. In the *Memorandum Opinion and Order* in Docket 20735, FCC 85-328, released June 27, 1985, the Commission adopted an approach to the Channel 6-noncommercial educational band interference problem based on an industry compromise submission. In that item the Commission stated, ". |w|hile the Commission declines to require the TV-6 licensees to provide space for the NCE-FM transmitters, we do encourage close cooperation and will consider the degree of cooperation (or lack thereof) in deciding disputed cases." Here, it is possible, from a technical standpoint, for the facilities of Channel 6 and and Channel 205 [10] (or other proposed channels) to be collocated, thereby making area wide service feasible. Although this forum does not appear to be the appropriate one to determine the extent to which cooperation has been attempted, we wish to express our concern in this regard and to encourage the parties to give serious consideration to the collocation option.

13. As to the precedent cited by Citizens, specifically *Muncie, Indiana and Eaton, Ohio*, 59 F.C.C 2d 778 (1976), and *Burlington and Newport, Vermont*, 45 R.R. 2d 786 (Broadcast Bureau 1979), even though the Commission acknowledged the importance of area wide noncommercial educational service, in neither situation was an incumbent licensee's authorization altered or otherwise affected. As to Section 396(a), the Commission agrees with Union that this Section does not mandate Commission action reserving particular channels in order to achieve wide area noncommercial educational service

14. In view of the foregoing, IT IS ORDERED, That the Application for Review filed by Citizens for Public Radio, Inc, IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding contact Joel Rosenberg, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**FOOTNOTES**

[1] Public Notice was given on April 7, 1986.

[2] Five letters from listeners in the Richmond area request Commission action to maintain existing noncommercial educational programming on Channel 293. In addition, Citizens subsequently filed Submissions for the Record attached to which are letters from Congressional Representative Thomas J. Bliley, Jr. and from Senator Paul Trible urging the Commission to consider Citizens' rule making request.

[3] On August 5, 1986, the Commission received a joint application for the assignment of Union's license for Station WRFK-FM to Paul T. Lucci and Wayne G. Souza

(BALED860805HZ). Subsequently, on September 16, 1986, Citizens filed a petition to defer action on this application pending the outcome of the instant rule making petition.

[4] That application has since been dismissed on July 11, 1986.

[5] Subsequently, the Commission received 29 applications for Channel 266A, all proposing commercial operation.

[6] See Section 73.202(a) of the Commission's Rules.

[7] Commercial or noncommercial operations can be likened to the selection of a program format, and the Commission policy is to leave programming format considerations to the discretion of its licensees. In the context of renewal, transfer and assignment applications, the Commission has previously concluded that regulation of formats would deter many stations form experimenting with new forms of entertainment programming, because licensees would be subject to hearing expenses should they abandon such formats. See: *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858 (1976), *recon. denied*, 66 F.C.C. 2d 78 (1977).

[8] Compare *Amendments to the* Television Table of Assignments to Change Noncommercial Educational Reservations, 51 FR 15628, April 26, 1986, where the Commission considers channel reallocations only at the request of the two affected licensees and does not allow other expressions of interest.

[9] In this regard, see New York City and Long Island, New York, FCC 84-572 (1984), wherein the Commission declined to accept a rule making petition seeking reassignment of an existing VHF television channel. Among the reasons for dismissing the proposal, the Commission noted that it knew of no existing station that was willing to change its city of license.

[10] We note that Central, the applicant for Channel 205, has filed a petition to deny the renewal of Channel 6 Station WTVR's license and has raised the issue of collocation therein.

**Before the**
**Federal Communications Commission**
**Washington D.C. 20554**

In re Applications of

A.S.D. ANSWER SERVICE, INC. — CC Docket No. 82-587
File No. 23194-CD-P-(01)-82 et al.

B.W. COMMUNICATIONS. INC. — CC Docket No. 82-588
File No. 23259-CD-P-(01)-82 et al.

P.A.L. COMMUNICATIONS. INC. — CC Docket No. 82-589
File No. 23168-CD-P-(01-82 et al.

VINEYARD COMMUNICATIONS. INC. — CC Docket No. 82-590
File No. 23199-CD-P-(01)-28 et. al.

For authority to construct new one-way paging stations in the Domestic Public Land Mobile Radio Serive on 34 on 43 MHz frequencies at various locations throughout the United States

**ERRATUM**

**Released: December 8, 1986**

In the Memorandum Opinion and Order, FCC 86-519, released November 21, 1986, the language in para. 6 which reads:

"ASD will dismiss its low band applications and not refile for five years;"

is changed to read:

"ASD will dismiss its low band applications and not refile for one year;"

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| PAYNE COMMUNICATIONS, INC. | MM DOCKET NOS. 84-392 |
| Evergreen, Colorado | 84-397 to 84-400 |
| | 84-404 to 84-405 |
| | 84-407 |
| | 84-410 to 84-412 |

For Construction Permit
for a new FM Station

**APPEARANCES**

*Forbes W. Blair* and *William D. Silva*, on behalf of Evergreen Broadcasting Company; *William M. Barnard* and *Mark Van Bergh*, on behalf of Best-Evergreen Broadcasting Company, Inc.; *James L. Oyster*, on behalf of Lord Broadcasting; *Vincent A. Pepper* and *Peter Gutmann* on behalf of Evergreen Ventures, Inc.; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of Interstate Broadcasting System of Colorado, Inc.; *Martin J. Gaynes* and *Lonna M. Thompson*, on behalf of Evergreen Broadcasting Corporation II; *John L. Tierney* and *Ann Bavender*, on behalf of Group Y Communications Investment Partnership, Ltd.; *Joseph F. Hennessey, Richard C. Rowlenson*, and *Thomas L. Siebert*, on behalf of Evergreen Communications Company; *Janet Hunter Driggs, pro se; R. Clark Wadlow, Jane D. Woodfin*, and *Adam M. Eisgrau*, on behalf of Evergreen Radio Inc.; and *Arthur I. Steinberg* and *Charles E. Dziedzic*, on behalf of the Mass Media Bureau.

**DECISION**

**Adopted: November 18, 1986; Released: December 12, 1986**

By the Review Board: MARINO (Chairman), JACOBS, and BLUMENTHAL.

Board Chairman MARINO:

1. Ten of the remaining eleven applicants for a new FM broadcast station in Evergreen, Colorado have filed exceptions in this comparative case. After reviewing the briefs, record, and oral argument held on June 20, 1986, the Review Board has concluded for the reasons detailed below, paras. 45-48, that this case turns on the substantial comparative factor of participation of ownership in the management of the proposed station. Ultimately on this decisive comparative factor, para. 47 below, Evergreen Radio Inc., with 50% credit, and Evergreen Broadcasting Corporation II, with 47% credit, are quantitatively superior, and Evergreen Radio Inc., prevails because its slight quantitative advantage is enhanced by some fifty years of local residence in the service area and significant civic activities. We note in passing that Evergreen Radio Inc. is also minority controlled but our decision need not and is not based on the constitutionally questionable enhancement credit for either minority or female status. *See United American Telecasters, Inc. v. FCC*, No. 85-1663 (D.C. Cir. filed October 15, 1986) Memorandum, p. 2; *WHW Enterprises Inc.*, FCC 86-458, released October 29, 1986, at note 9; *Jarad Broadcasting Co., Inc.*, FCC 86R-66, released October 16, 1986, at para. 7.

2. *Background:* By *Hearing Designation Order*, 49 Fed. Reg. 19117 (1984), the Commission designated for consolidated hearing twenty-two mutually exclusive applications for authority to construct a new FM broadcast station on Channel 243C at Evergreen or Golden, Colorado. Thereafter, following a trial-type comparative hearing, presiding Administrative Law Judge (ALJ) Kuhlmann issued a 38 page *Initial Decision (I.D.)* relative to the eleven applicants remaining in the contest, all of which are for Evergreen, concluding that all but Lord Broadcasting are basically qualified to be Commission licensees and that Group Y Communications Investment Partnership, Ltd. (Group Y) is the comparatively superior applicant. *Payne Communications, Inc.*, FCC 86D-3, released January 23, 1986.

3. The proceeding is now before the Review Board on exceptions to the *I.D.* filed by ten of the applicants: Lord Broadcasting, Evergreen Broadcasting Company (EBC), Best-Evergreen Broadcasting Co. Inc. (Best-Evergreen), Evergreen Ventures, Inc. (EVI), Interstate Broadcasting System of Colorado, Inc. (Interstate), Evergreen Broadcasting Corporation II (Evergreen II), Group Y, Evergreen Communication Company (ECC), Janet Hunter Driggs (Driggs), and Evergreen Radio Inc. (ERI). Many of the *I.D.'s* findings and conclusions are adopted, except as modified below; but for the reasons set forth below, we conclude that a grant of ERI's application would best comport with prior Commission precedent. Because the *I.D.* denied the application of Payne Communications, Inc., and that applicant has not filed exceptions, its application will be dismissed for failure to prosecute. *See* Section 1.276 (f) of the Commission's Rules, 47 CFR 1.276 (f). We turn first to the basic qualifications issue resolved adversely to Lord Broadcasting, and then to the comparative issue.

**Short-Spacing Issue**

4. *Lord Broadcasting.* On the final date for amendments as of right – the "B" cutoff date, here July 15, 1983 – Lord Broadcasting filed an amendment proposing a new transmitter site to meet objections raised by the U.S. Department of Commerce that its Research Laboratories located at the Table Mountain Radio Receiving Zone outside Boulder, Colorado would be subjected to excessive radio-frequency irradiation. *I.D.*, para. 14; *see also HDO, supra*, Appendix, paras. 30-31, 53-54. That amendment was conditionally accepted by the Commission in the *HDO* subject to further clarifying information. *Id.* When, however, Lord Broadcasting amended its application on May 29, 1984, pursuant to *HDO* directive, its application was dismissed by the ALJ on the basis of comments filed by the Mass Media Bureau that the proposed amendment specified a new transmitter site which did not meet minimum mileage separation requirements (*i.e.*, 105 miles) prescribed by Section 73.207 of the Commission's Rules, 47 CFR 73.207, with respect to Station KSBT-FM, Steamboat Springs, Colorado. *Memorandum Opinion and Order*, FCC 84M-3674, released August 23, 1984; Mass Media

Bureau Reply Br. at 1-2. The proposed site was located only 92.2 miles away from KSBT-FM. *Id.*, para. 15. The engineering file upon which the Bureau relied in formulating its comments inadvertently failed to contain a copy of Lord Broadcasting's amendment of July 15, 1983, and the Bureau was under the erroneous belief that Lord Broadcasting was proposing a new transmitter site subsequent to the "B" cut-off date. Bureau Reply Br. at 2.

5. Consequently, when the error was discovered, the Bureau supported Lord Broadcasting's request for reinstatement *(id.)*. The ALJ reinstated the application, but because the proposed site was short-spaced with KSBT-FM, he specified an appropriate issue. *Id.*, para. 14; *Memorandum Opinion and Order*, FCC 84M-4399, released October 15, 1984. Following the evidentiary hearing, the *I.D.* held that Lord Broadcasting failed to demonstrate sufficient grounds to justify a waiver of Section 73.207 and that its alternative proposal to return to its original site if the waiver request was denied (initially made in its reply findings) came too late. *I.D.* , paras. 112-114.

6. In its exceptions, Lord Broadcasting contends that the ALJ erred in failing to reject its amendment for a new site, if the application could not be granted at that location due to the short spacing with the Steamboat Springs facility. It emphasizes that it is now ready, willing, and able to revert to its old site if the application specifying the new site cannot be granted. Alternatively, Lord Broadcasting contends that the unique circumstances present here dictate a grant of its application or at least a waiver of Section 73.207. Specifically, it maintains that its application qualifies as a Class C1 station, *i. e.*, a newly permitted class of station differing from a Class C in maximum power, antenna height and spacing requirements, which, under rules effective May 1, 1984, would not be short-spaced to KSBT-FM. *Report and Order in Docket 80-90, FM Broadcast Stations*, 94 FCC 2d 152 (1983) *(Report and Order); Clarification of FM Application Procedures in Light of the Adoption of New Rules in BC Docket 80-90*, 55 RR 2d 1205 (1984) *(Clarification)*. It argues that its application falls within the ambit of the new rules because the rules were in effect on the date its application was conditionally accepted in the *HDO* and subsequently ratified by the ALJ. Lord Broadcasting further claims that its selection of the transmitter site was not for its convenience but instead was to meet the concerns of the Department of Commerce. Finally, it attempts to distinguish *North Texas Media, Inc.*, FCC 84-456, released October 4, 1984, *aff'd*, North Texas Media v. F.C.C., 778 F. 2d 28 (D.C. Cir. 1985), a case cited by the ALJ in support of his adverse holding.

7. We will deny the exceptions. At the outset, Lord Broadcasting's efforts to project its plight onto the ALJ by faulting him for accepting its amendment and leaving it with an "ungrantable" application, must fail. It was the applicant, not the ALJ, which voluntarily chose to rectify the excessive radiation concerns of the Department of Commerce by proposing a site short-spaced to an existing station. And, although Lord Broadcasting was on notice since June 22, 1984 -- the date the Mass Media Bureau filed comments concerning this matter -- that its site was violative of the minimum mileage separation rules, it never attempted to amend its application prior to hearing to specify a fully-spaced site, notwithstanding the knowledge that none of the other applicants was short-spaced. Rather, it decided to meet the short-spacing issue at the hearing, and its current quandary, as aptly observed by EVI, has "resulted only after Lord failed to avail itself of the opportunity expressly provided by the issue to justify grant of a waiver." EVI Reply Br. at 9.

8. Nor can the applicant now extricate itself from its dilemma by reverting back to its original site. In the first place, it is not altogether clear that the objections raised by the Department of Commerce concerning the original site proposal have been obviated. *See* EVI Reply Br. at 9. In any event, we concur with the ALJ that Lord Broadcasting's request in its reply findings to return to its old site if a waiver was not granted is grossly out of time and would be disruptive to the orderly conduct of this proceeding. As the Court of Appeals held: "We cannot allow the [applicant] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." *Colorado Radio Corp. v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941). In this regard, we note that Lord Broadcasting filed with the Board on April 10, 1986 (*i. e.*, subsequent to the filing of exceptions), a contingent petition for leave to amend requesting that it be permitted to return to its original site. For the reasons set forth above, Lord Broadcasting's amendment must be rejected for lacking good cause. *See Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1029-1031, 47 RR 2d 1307, 1317-1318 (Rev. Bd. 1980), *rev. denied*, FCC 80-736, December 4, 1980.

9. We also agree with the ALJ that Lord Broadcasting failed to demonstrate sufficient grounds for a waiver of Section 73.207. As the presiding officer correctly held (*I.D.* , para. 112), it is the Commission's policy not to waive its minimum mileage separation requirements if there are applicants for the channel who will comply with them. *See Amherst Broadcasting, Inc.*, 44 RR 2d 1548, 1552 (1978). And, of course, all of the applicants but Lord Broadcasting have fully-spaced proposals. Lord Broadcasting's arguments for waiver based on the *Report and Order* creating the new Class C1 stations are unavailing because, contrary to its brief, the new rules cannot be construed to apply to its application, or amendment thereto, as they antedate the effective date of the new rules, *i.e.* May 1, 1984, *see Clarification, supra*. And the *Report and Order* expressly precludes the acceptance of any application filed prior to the effective date of the new rules. *Report and Order, supra*, 94 FCC 2d at 181-182; *see also North Texas Media, Inc., supra*, where, as noted by the ALJ (*I.D.* , para. 113), the Commission rejected a claim similar to that made by Lord Broadcasting.

10. Lord Broadcasting's attempt to distinguish the facts of this case from *North Texas Media, Inc., supra*, is not persuasive. Its application (and amendment thereto) was filed before the *effective* date of the new classification and separation standards, and the fact that its amendment to the application was filed subsequent to the adoption date of the new standards, *i.e.*, May 26, 1983, whereas North Texas' was not, is legally insignificant. Additionally, Lord Broadcasting's suggestion that its original site was somehow deficiency-free, whereas the application in *North Texas* was never in compliance with the Commission's Rules, is unconvincing and certainly no basis to distinguish the two cases. An amendment to obviate the Department of Commerce's concern was at least as necessary here as any amendment filed to cure interference pro-

scribed by the Commission's Rules. In sum, we sustain the ALJ's ruling that Lord Broadcasting has not demonstrated that it is technically qualified.

**Comparative Issue**

11. Because the applicants are essentially equal with respect to most of the comparative factors set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), the only matter warranting treatment in any detail concerns the relative percentages of full-time quantitative integration credit awarded to each applicant. *See Policy Statement, supra*, at 395, 5 RR 2d at 1909 (full-time participation in station operation by owners "consider|ed]...[a] factor...of substantial importance" "in securing the best practicable service"). After rejecting arguments made by most of the applicants that they were entitled to 100% full-time quantitative integration credit, the ALJ concluded in his *I.D.* that "[o]nly two applicants present *bona fide* proposals to integrate all of their principals in managerial roles on a full-time basis: Group Y and [ECC]." *I.D.* , para. 161. The highest percentage of full-time quantitative integration credit awarded any of the other applicants was 51% (to Driggs). *Id.* He added, in accordance with Commission precedent, that although the applicants proposing "less than 100% or full-time integration of owners into management present...qualitative factors which enhance the value of their [integration] proposals, those attributes...cannot overcome the *clear* quantitative difference between their proposals and those who will be 100% integrated." (Emphasis added). *Id. See Van Buren Community Service Broadcasting*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981)(subsequent history omitted)(12.5% quantitative difference held to be "clear"). The ALJ selected Group Y over ECC on qualitative grounds. *I.D.* , paras. 162-171. Nearly all of the non-prevailing parties except to the quantitative credit awarded Group Y and ECC, as well as to the failure of the ALJ to award each of them, respectively, full-time quantitative credit. In appropriate cases, where our discussion of the exceptions is equally applicable to more than one applicant, we have grouped those applications. We begin our analysis with Group Y and ECC in light of our disagreement with the ALJ that those two applicants are entitled to 100% quantitative integration credit. We will then treat the exceptions with respect to the quantitative integration proposals of the other applicants. And, finally, we will address the qualitative differences separating the applications of ERI, Evergreen II, and Driggs, which we find are the front-runners.

12. *Group Y.* Group Y is a limited partnership with two general partners, each owning 20% of the partnership, and six limited partners, each with 10%. *I.D.* , para. 90. The general partners, Samuel J. Yacovazzi and his wife Anna, propose to work full-time as general manager and station manager, respectively. *Id.*, paras. 90, 92. The ALJ rejected arguments raised at hearing that Group Y's limited partners (none of whom is proposed to be integrated in the station operations) should be included in the integration analysis thereby diluting the quantitative integration percentage to which Group Y would otherwise be entitled. He noted in this regard that the Yacovazzis initiated and prosecuted the Group Y proposal without assistance from the limited partners, apart than their financial investments. *Id.*, para. 153. The ALJ also made a finding that the Group Y partnership agreement gives the limited partners the right to remove the general partners *for cause*, but noted that even if that occurs the limited partners will not be permitted to manage or operate the station. *Id.*, para. 154. Finally, he rejected arguments that Ms. Yacovazzi would not fulfill her integration commitment. *Id.*, para. 152.

13. Nearly all of the competing applicants again challenge the *bona fides* of the Group Y limited partnership structure, confining the focus of their objections to certain provisions of the Group Y limited partnership agreement relating to the removal of the general partners by the limited partners. Specifically, the exceptors point out that the agreement, by its terms, permits the limited partners to remove the general partners by a simple majority vote (Group Y Exhibit 1, §10.5) and to appoint substitute general partners (*id.*, §14.1) upon receipt of an opinion from counsel that their limited liability and tax status will remain undisturbed (*id.*, §10.6). Exceptors assert that the Colorado Limited Partnership Act provides that limited partners will not lose their limited liability by voting for the removal or appointment of general partners and therefore the opinion of counsel that the limited partners may continue the operation of the station is a *pro forma* matter. They further argue that Commission precedent requires that limited partners be cast in a purely passive role with no authority to control the licensee if they are to be excluded from the integration analysis, citing *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488, 49 RR 2d 1589, 1584 (1981), and that the Group Y integration proposal therefore cannot be fully credited.

14. In its reply brief, although conceding that the partnership agreement is silent on the point, Group Y contends that the evidence of record is clear that it was the intent of the parties that the removal of the general partners pursuant to §10.5 can only be for cause. In support, it refers to a removal provision in §14.3 (governing appointment and duties of liquidator) which reads: "The Liquidator...(if other than the General Partners) may be removed at any time, with or without cause, by written notice of removal signed by a majority in interest of the Limited Partners." Group Y argues that there would be no reason for including this distinction in §14.3 if a general partner could ever be removed without cause. Moreover, Group Y argues that the requirement of obtaining an opinion that would exclude the limited partners from limited liability and unfavorable tax status is sufficiently onerous to prevent the limited partners from removing the general partners. Finally, it reiterates that the limited partners have from the outset acted merely as limited partners.

15. We agree with the exceptions that Group Y's limited partnership cannot be awarded 100% quantitative integration credit. Contrary to Group Y's assertion and a similar finding made by the ALJ, we do not find sufficient record evidence that, on the "B" cut-off date, the limited partners could remove the general partners only for cause. The applicant filed a post "B" cut-off petition for leave to amend on September 15, 1985 requesting such a provision, but that amendment was accepted for information purposes only. FCC 85M-4061, released October 17, 1985. In any event, such a material modification of the partnership agreement after the time for filing amendments as of right had expired would have been prejudicial to the competing applicants, and unacceptable

on grounds of impermissible comparative upgrading. *See e.g. Alexander S. Klein*, 86 FCC 2d 423, 434, 49 RR 2d 606, 615 (1981); *Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934, 60 RR 2d 1199, 1202 (1986) (on reconsideration).

16. Nor are we convinced that §14.3 of the agreement, cited by Group Y, demonstrates that the intent of the parties was that the general partners could be removed only for cause. It is equally tenable that, in light of the insertion of the "with or without cause" provision in §14.3 and its absence in §10.5, the parties envisioned that the limited partners would have full discretion to protect their interests by removing the general partners whenever they thought desirable. This construction of the language of the agreement is consistent with the fact that the limited partnership was drafted by one of the original limited partners, whom it could reasonably be assumed would be interested in adequately protecting any future investment. Group Y Response to Further Written Cross-Examination, filed February 22, 1985; Group Y Application, Exh. 1, Table I (official notice taken). Moreover, we note that §10.1 of the agreement, which explicitly proscribes limited partners from participating in the management and control of the partnership's business, appears applicable only when a limited partner is "acting solely as such."

17. The controlling law concerning limited partners at the time the limited partnership agreement was drawn up, *i. e.*, December 16, 1982, was *Anax Broadcasting, Inc., supra*, where, as exceptors correctly note, the interests of limited partners were deemed inconsequential to the integration analysis provided the general partners were properly insulated from any possibility of control or influence by the limited partners. *See* 87 FCC 2d at 488, 49 RR 2d at 1594. Today, the criteria used to determine the requisite insulation threshold has been articulated in greater detail. Thus, for example, in *Ownership Attribution*, 58 RR 2d 604, 619-620 (1985) (on reconsideration), the Commission warned that a limited "partnership agreement should either prohibit the exempt [from attribution] limited partner from voting on the removal of a general partner or limit this right to situations where the general partner is subject to bankruptcy proceedings...or is adjudicated incompetent by a court of competent jurisdiction." The Commission explained that "a general partner is likely to follow the advice of a limited partner if he or she knows that the limited partner possesses the power of removal even if his or her replacement is subject to Commission approval. Therefore, the power of removal, even if it is a 'contingent' right, potentially provides a limited partner with the ability to control, or at least to materially influence, partnership affairs." *Id.*, 58 RR 2d at 616-617 n. 51. *See also Daytona Broadcasting Co., Inc., supra*, at 935 n. 6, 60 RR 2d at 1202 n. 6 (making applicable the criteria set forth in *Ownership Attribution, supra*, to comparative cases for diversification purposes); *compare Independent Masters, Ltd.*, 60 RR 2d 835, 843 (Rev. Bd. 1986) (partnership agreement not rendered fatally deficient by provision allowing removal of general partner by limited partners only for "material default"); *Ownership Attribution*, FCC 86-410, released November 28, 1986, at paras. 4-6 (clarification of reconsideration order).

18. In our view, the express articulation of this prohibition merely illuminated the basic standard adumbrated in *Anax Broadcasting, Inc., supra*. The fact that the Commission has been further refining its insulation standard during recent years (*i.e.*, first looking to the provisions of the Uniform Limited Partnership Act of 1976 as a standard, *see Ownership Attribution, supra*, 97 FCC 2d 997, 1023, 55 RR 2d 1465, 1485 (1984), and then going beyond that standard, *see Attribution Ownership, supra*, 58 RR 2d at 606, 618) is not significant in this case because the basic requirement for insulation of limited partners was clearly operative at the time Group Y's agreement was prepared. In sum, the provisions permitting the limited partners to remove the proposed integrated general partners are fatal, and no quantitative integration credit can be given. *See Policy Statement, supra*, at 395 n. 6, 5 RR 2d at 1909 n. 6 ("important that integration proposals be adhered to on a permanent basis"); *Signal Ministries, Inc.*, 104 FCC 2d 1482, 1497-1498 n. 16, 60 RR 2d 1700, 1711-1712 n. 16 (Rev. Bd. 1986) (no credit given where non-integrated principal could repurchase after two years the stock of integrated principals); *cf. Tele-Broadcasters of California, Inc.*, 58 RR 2d 223, 232 n. 43 (Rev. Bd. 1985) ("[e]phemeral integration promises have little comparative value").

19. *ECC.* ECC is a general partnership comprised of three partners, each of whom purportedly will work full-time at the station in managerial roles: Elizabeth Siebert, a 51% owner, as general manager; Keith Siebert, a 39% owner, as financial officer/business manager; and Patricia Knous, a 10% owner, as program director. *I.D.*, para. 95-97. The ALJ credited each of the commitments and awarded ECC 100% quantitative integration credit. *I.D.*, paras. 161. The exceptions focus on whether Mr. Siebert's position as financial officer/business manager should be considered managerial. We need not consider this very close question (*see* Tr. 466-467), however, because the record reveals a much more basic defect. Specifically, the exceptions also noted that "ECC is an oral general partnership consisting of three partners," all purported to have greatly disparate equity shares in the entity. Evergreen II Exceptions at 21. At oral argument, the Board inquired as to whether integration credit, decisional here, ought to be awarded on the basis of an "oral partnership," particularly one in which the partners assert widely varying amounts of ownership interest for integration purposes. *See* Tr. of Oral Arg. of June 20, 1986 at 1066-1073. Based on specific Commission requirements and the uninterrupted flow of analogous precedent, the Board holds that as a matter of law it cannot award integration credit based upon oral ownership arrangements such as ECC's, at least where we are not dealing with a sole proprietorship.

20. Our analysis begins with the basic requirements of the broadcast application form. Until a recent amendment of FCC Form 301, all applicants were affirmatively required to contemporaneously submit attested copies of their basic organizing documents, irrespective of organizational form. Thus, prior to the 1981 revision, Instruction 3 of Section II, Form 301 stated:

> Submit as Exhibit No. three copies (ONE COPY CERTIFIED) each of the Articles and By Laws, if applicant is a corporation or incorporated association, or three copies (ONE COPY SIGNED) of the partnership agreement, if applicant is a partnership. (ARTICLES MUST BE CERTIFIED BY SECRETARY OF STATE OR OTHER

PROPERLY DESIGNATED STATE OFFICIAL AND BY LAWS MUST BE CERTIFIED BY APPROPRIATE OFFICIAL OF THE COMPANY)

However, as a paperwork reduction measure, the Commission deleted the filing requirement, stating only that an "applicant will no longer be required to submit the partnership agreement or articles of incorporation." *Revision of Form 301*, 50 RR 2d 381, 382 (1981). While applicants need no longer submit their underlying organizational documents with the application, the Commission's plain language obviously presupposes the existence of such basic documentation. *See also* [Revised] Form 301, General Instruction E ("[a] copy of this application and *all related documents* shall be made available for inspection by the public ... ."). Though an applicant's organizational documentation need no longer be submitted with the application, both the public (which may oppose the grant of the application) and the Commission must be assured of the formal legal composition of the applicant not only for comparative licensing purposes, but for other basic purposes as well, *e.g.*, FCC multiple ownership rules or 47 U.S.C. §310 (control and alien ownership).

21. But even beyond the plain language requirement above, is the fact that - for numerous purposes, including comparative evaluation - the Commission cannot rely on informal or oral ownership arrangements. In the comparative licensing process, the Board has long held that it will not award ownership integration credit where a principal's purported ownership share could either evaporate or be diluted in the near future. A principal's purported ownership share must, for integration purposes, be assured by a validly protected legal right. Thus, for example, where a principal's purported ownership share could evaporate or diminish by virtue of outstanding options held by one or more other parties, full integration credit will not be awarded. *See e.g., Washington's Christian TV Outreach, infra*, and the more complete discussion of this very point in paras. 28-30, below. To assure against the disappearance or dilution of a general partner's stated ownership share, the Commission demands that a purported general partner's ownership share be guaranteed by express contractual clauses that would prevent, for example, summary removal of that general partner or even diminution of a claimed general partner's quantitative ownership share. *Ownership Attribution, supra*, 58 RR 2d at 619-620; *see also supra* paras. 15-18. These written guarantees of a continuation of a general partner's quantitative ownership share against disappearance or diminution are required, as well, in comparative licensing cases before we may grant integration credit to a claimed general partner. *See generally Daytona Broadcasting, Co., Inc., supra*, at 934, 60 RR 2d at 1202.

22. Although parties may form oral general partnerships, or what the common law regarded as "partners at will," most jurisdictions have adopted a Statute of Frauds along the following lines: "In addition to requirements of good practice, the Statute of Frauds may technically require a partnership agreement to be in writing where the agreement is to form a partnership that is to continue for more than one year." E. Latty & G.T. Frampton, BASIC BUSINESS ASSOCIATIONS, at 41 (Formation of Partnerships) (1963). *See also* WILLISTON ON CONTRACTS §495, at 583-584 (3rd ed. 1960) which teaches that a "contract of partnership which is to continue for more than a year is within the Statute [of Frauds]." And, *see* H.G. Hemm & J.R. Alexander, LAWS OF CORPORATIONS §20, at 67 (3rd ed. 1983), which recites the general rule that "[w]hile the formation of a partnership is not within the statute of frauds, various ancillary transactions involved in the creation may fall within the statute. These include: ...the contract to form a partnership to endure for more than one year." Thus, without a writing, the ECC general partnership allegedly formed at, or before, the filing of its application is probably not legally recognized under any relevant Statute of Frauds. (Indeed, it is noteworthy that England initiated the Statute of Frauds in 1677, more properly the "statute of frauds and perjuries," because "[i]ts object was to close the door on numerous frauds and perjuries" then occurring at common law proceedings. BLACK'S LAW DICTIONARY 789 (4th ed. 1968)). Our reference to state law is for the purpose of confirming that an entity's organizational agreement provides *the Commission* with the tangible assurances necessary to award a stated principal a specific amount of integration credit, based upon binding contractual agreements as between all of the principals. In other words, where the Commission demands that a purported general partner be contractually guaranteed against removal or diminution of a stated ownership share, as in *Ownership Attribution, supra*, it is saying - in essence - that a general partner's contractual assurance of a continuing percentage share is *our* legal assurance as well against diminishing or vanishing general partners.

23. Where, as with ECC, the purported general partners have no written contractual agreement setting forth the complete or binding legal relationships as amongst themselves, and where the partnership "at will" could change or disappear "at will," there is insufficient assurance of the continuity of such stated interests to award integration credit, for we will not award such credit where the ownership interest is inherently emphemeral. *See Signal Ministries, Inc., supra*, at 1497 n. 16, 60 RR 2d at 1711-1712 n. 16. We acknowledge that written ownership agreements also can be amended, and that applicants must report such amendments. However, a written ownership agreement at least assures the parties *as amongst themselves* - and, in turn, the Commission - of a general partner's binding legal right to a continuing status in the organizational structure. An oral partnership - even assuming *arguendo* a validity to conduct business for more than one year beyond formation and the absence here of any relevant Statute of Frauds - provides no similar assurances. In fact, were mere oral agreements considered sufficient to assure the stability of a general partner's ownership share, then the Commission's mandatory requirements for express contractual clauses guaranteeing such stability for general partners set forth in *Ownership Attribution, supra*, would be entirely superfluous. We cannot so say, nor would it make sense to require written agreements for multiparty organizations in one organizational context to ensure toward ownership share stability, and not in another. Accordingly, we cannot award to ECC any integration credit on so tenuous an organizational structure. Nor will we accept an amendment at this late date to cure such a fundamental application failure. While ECC's original application may not have been deficient *per se*, thus requiring outright procedural rejection, its tenuous legal status deprives it of the underlying solidity upon which integration credit has always been based. *E.g. Policy Statement, supra*, 1 FCC 2d at 395 n. 6, 5 RR 2d at 1909 n. 6 (and *supra* para. 18). In sum, we

cannot award ECC integration credit on so inherently unstable a platform as an informal, oral partnership arrangement, in which the partners "at will" can rearrange their ownership interests "at will" or disappear altogether without the assurance of express contractual rights.

24. *ERI and Evergreen II.* As to ERI and Evergreen II, the ALJ substantially diminished the quantitative integration proposals of each applicant on the ground that it proposed one of its principals in the role of officer manager, a position generally regarded as non-managerial. Turning to the specific applicants, ERI is a corporation comprised of two stockholders: Carmen Beall and her husband Levi. *I.D.* , para. 101. They own 100% of the stock jointly but each proposes to vote 50% of the stock. *Id.* Mr. Beall will work as general manager and Ms. Beall as office manager. *Id.*, paras. 102-103. In addition to her supervisory clerical duties, she also claims that she will implement the EEO program and participate in policy and programming decisions. *Id.*, para. 102. Evergreen II, in turn, is a corporation composed of three stockholders, only two of whom propose full-time positions at the station: 47% stockholder Alan Goodman as general manager and his wife Barbara Goodman, also a 47% stockholder, as office manager, business manager, traffic manager, community relations head, and EEO supervisor. *Id.*, paras. 86-88. The ALJ opined that the overall duties of Ms. Beall and Ms. Goodman would not play a significant role in the management and policy of the stations and that neither should be accorded quantitative integration credit for their participation. *Id.*, paras. 151, 160.

25. Both applicants strenuously challenge the ALJ's failure to credit their respective proposals, arguing essentially that their principals will have important managerial functions. In particular, ERI contends that Ms. Beall's proposed position should be construed in the context of her prior work experience at Station KFSC-AM, Denver, Colorado. There, in what ERI characterizes as a "Mom and Pop" operation, it maintains that Ms. Beall was intimately involved in every aspect of the station although officially only holding the job title of office manager. ERI adds that Ms. Beall's proposed duties of participating in station policy and programing decisions hardly typify the traditional role of an office manager. On the other hand, another exceptor, EVI, would further diminish ERI's quantitative integration total by discounting Mr. Beall's commitment. EVI asserts that Mr. Beall's current business activities at a movie theatre occupy 60 to 70 hours per week, thereby precluding effectuation of his integration commitment. Additionally, various exceptors contend that ERI should be assessed a comparative demerit for lacking in candor in responding to interrogatories concerning the termination of the Beall's employment at KFSC-AM.

26. The ALJ properly declined to award quantitative integration credit for the proposals of ERI's Ms. Beall and Evergreen II's Ms. Goodman, respectively. As correctly noted by the ALJ, the Board has previously held that "the occupational duties typically associated with the positions of bookkeeper, office manager, and traffic manager have not been deemed managerial, and the positions themselves not accorded integration credit." *Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324, 58 RR 2d 1488, 1489 (Rev. Bd. 1985). And in *Apogee, Inc.*, 99 FCC 2d 979, 987, 57 RR 2d 1585, 1591 (Rev. Bd. 1985), *modified on other grounds*, FCC 86-3, January 8, 1986, we expressly refused to credit an integration proposal where there was some blurring of non-managerial and managerial functions on the rationale that the proposed position would not sufficiently involve policy making and station management functions. Group Y's reply brief (at 15-16) aptly points out that the role Ms. Beall has proposed for herself involves typical employee-type activities: responsibility for preparing station program logs and monthly billing, supervision of the clerical staff, and announcing. It is only at the end of her enumerated duties that she refers to the EEO program and her participation in policy and programming decisions. It would appear therefore that she considers these latter activities as merely incidental to her main duties. Unlike the "Mom and Pop" operation at KFSC-AM where her duties were more extensive, the basic responsibilities for making policy and deciding programming will rest with her husband and a proposed program director. *I.D.*, para. 160.

27. Similarly, for the reasons discussed above, the functions of Ms. Goodman are lacking in those policy making and station management activities that would justify quantitative integration credit; that is, she will keep records of all business transactions and hiring policies, provide internal coordination of office help, and maintain commercial logs. *Id.*, para. 88. We will deny the exception concerning the effectuation of Mr. Beall's integration commitment, however, for lack of substantial record evidence undercutting his full-time commitment. Tr. 886. Finally, we are not persuaded that ERI should be assessed a demerit for lack of candor concerning its interrogatories. As ERI correctly observes, the Commission's new character policy statement, *Character Qualifications*, 102 FCC 2d 1179, 1232, 59 RR 2d 801, 836 (1986), precludes the imposition of comparative demerits not requiring disqualification, and none of ERI's opponents contend here that the applicant has engaged in disqualifying conduct. In any event, no disqualifying issue was sought and the evidence adduced on the record warrants no such finding. ERI and Evergreen II will be awarded 50% and 47% full-time quantitative credit, respectively.

28. *Driggs.* Driggs is a sole proprietorship, but pursuant to an option agreement with Delta Radio, Inc., she is required to incorporate if her application is granted and allow Delta to acquire up to 49% of the corporation. *I.D.*, para. 100. If she does not incorporate as noted above, Delta would then have the right to acquire up to 49% of her proprietary interest. *Id.* Ms. Driggs proposes to work full-time at the station as the general manager. *Id.* The ALJ concluded that Driggs was entitled to only 51% quantitative integration credit in light of the Delta option. Driggs, who is now prosecuting her application *pro se*, asserts in her exceptions that there is no evidence that Delta will attempt to exercise the option, that there has been no showing that the option is valid or enforceable, that the minority interest of Delta would not be cognizable under Note 2(b) of Section 73.3552 of the Commission's Rules (Multiple Ownership rules) because she owns a majority of the stock, that she would not offer Delta any voting stock, and that she would effectively control 100% of any corporation in light of her 51% majority ownership.

29. We will sustain the ALJ's ruling on this matter. Contrary to the implication of Drigg's exceptions, there is no requirement that the Commission or the competing applicants demonstrate that an option holder will exercise its option before the option will be construed adversely to the interests of the applicant. Rather, the burden rests on the applicant with outstanding options to demonstrate

that they will not be exercised. *See Signal Ministries, Inc., supra*, at 1490, 1491, 60 RR 2d at 1707-1708; *see also Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366 (Rev. Bd. 1983) ("Commission will take cognizance of options that are adverse to the interests of its applicants in the absence of evidence that the options will not be exercised"). In *Signal Ministries, Inc., supra*, the Board declined to construe a convertible stock interest against an applicant for either integration or diversification purposes, based upon that applicant's demonstration, on the record, that she had full power to extinguish the conversion rights, and intended to do so. Here, by contrast, the right to exercise the option is beyond the control of Driggs, and the record is devoid of any evidence adduced from the option holder that it would not exercise its option. Indeed, there is some indication that the converse may be true: that is, the ALJ noted in an *Order* released March 14, 1985 (FCC 85M-1063) that Delta, then an applicant in another proceeding (MM Docket No. 84-643, Cheney, Washington), affirmatively represented on January 8, 1985 that, as a media interest, it held an option to acquire 49% of Drigg's application upon the grant of a construction permit. Moreover, with respect to Driggs' exception concerning the validity of the option, we simply note that the Commission is not the primary forum for testing the legal enforceability of the option. *See Agnew-Sachs Broadcasting*, 103 FCC 2d 899, 60 RR 2d 1157 (Rev. Bd. 1986). This is the type of matter better left to an appropriate court of competent jurisdiction, and is similar to the reason why we would not infer a binding legal partnership agreement, in the case of ECC, without a writing (*see supra* para. 22).

30. Even assuming, however, that the option may now not be exercised, there is no indication in the record that on the "B" cut-off date the option would not be exercised. At oral argument, Driggs contended that she entered into the option because she "was misled into believing that the FCC would throw out [her] case if [she] didn't have multi-millionaires on [her] application." Tr. of Oral Arg. 1075. To permit the applicant now to improve its comparative posture by disregarding the option, to the detriment of the competing applicants whose comparative positions were fixed when the time for amendments as of right expired, would be to violate the Commission's bedrock prohibitions against comparative upgrading. *See Alexander S. Klein, supra*, para. 15. Driggs' exception concerning Section 73.3555 (Multiple Ownership rules) is also unavailing, since that section has no applicability here. Similarly, her assertion that she would not offer Delta any voting stock is meaningless, since, as EVI points out in its reply brief, the option itself provides for only a single class of stock, and Delta would be entitled to acquire 49% of it. Moreover, the contention that 51% of the stock is equivalent to 100% because it represents majority control has previously been considered and rejected by the Board. *See Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 512-515, 52 RR 2d 1210, 1215-1217 (Rev. Bd. 1982) (subsequent history omitted). However, we will not reduce Driggs' quantitative integration credit any further, as suggested by EVI, for her alleged failure to report fully the media interests of Delta. Driggs' reply brief reflects that Ms. Driggs was aware that the same ALJ was presiding over the Cheney proceeding, where Delta was an applicant, and the Evergreen proceeding, and persuasively argues that it was obvious she was not trying to withhold any material information from the ALJ or the Commission. *See, e.g., Superior Broadcasting of California*, 94 FCC 2d 904, 910 n. 7 (Rev. Bd. 1983). Driggs is entitled to 51% quantitative integration credit.

31. *EBC, Best-Evergreen Broadcasting Company, and EVI.* The applications of EBC, Best-Evergreen, and EVI have been combined for purposes of discussion because each of the three applicants' chances of prevailing in this contest rest solely on the question whether their proposals are *bona fide* and entitled to quantitative integration credit. Turning first to EBC, that applicant is a limited partnership with three general partners and one limited partner. *I.D.* , para. 30. The general partners all propose to work full-time at the station in managerial positions, while the limited partner is prohibited by the partnership agreement from participating in the partnership business. *Id.*, paras. 49, 57-58, 65, 67. The limited partner, Philip Tunis, however, is concededly the prime mover behind the prosecution of EBC's application, having employed a research agency to find general partners with superb qualitative enhancements for his business venture. *Id.*, paras. 30-32. Among other things, the *I.D.* found that Tunis advocated the use of a limited partnership form of business (*id.* , para. 33), selected and contacted the partnership's local counsel and the lawyer that drafted the partnership agreement (*id.* ), selected and contacted the partnership's FCC counsel and engineering counsel (*id.* , para. 34), authorized the preparation of the partnership's engineering exhibits prior to entering into the partnership (*id.* , para 35), participated in the selection of the applicant's proposed antenna site (*id.* ), and financed the filing and prosecution of the application (*id.* , para. 36).

32. Best-Evergreen, in turn, is a corporation comprised of one voting stockholder, Terry G. Buenzle, and one non-voting stockholder, her husband Robert J. Buenzle. *Id.*, para. 68. Ms. Buenzle proposes to work full-time at the station as general manager. *Id.* She conceded at hearing, however, that had it not been for her husband's interest in broadcasting, she probably would not have applied for the station. *Id.*, para. 70. Mr. Buenzle, currently a communications attorney in Washington, D.C., will not be integrated into the station but proposes to move to Evergreen with his wife and daughter. Prior to the "B" cut-off date, the Buenzles were a partnership with Mr. Buenzle making all of the partnership decisions. *Id.*, para. 69. He selected the engineer and counsel, arranged for a transmitter site, and developed the financial proposal. *Id.* After the change in the legal structure, Mr. Buenzle (or his law firm) prepared Best-Evergreen's written case. *Id.* The change in the applicant's legal structure from partnership to corporation was taken because Mr. Buenzle believed their application could not prevail if he were to continue in the same ownership role. *Id.*

33. EVI is a corporation comprised of four stockholders: Jean P. Powers Mann, a 45% shareholder, who will work full-time as general manager; Jacob A. Williams, III, a 24.5% shareholder, proposed as full-time program director; Lucille M. Martinez, a 24.5% shareholder, to be news and public relations director; and Cynthia C. Marschner, a 6% shareholder, to work as office operation, traffic, budgeting, and financial record head. *Id.*, para. 75-78. The husbands of Ms. Marschner and Ms. Mann, Richard Marschner and Frederick Mann, also intend to work at the station as salesmen, as does their colleague, Charles Samson, who would be the station's music director. *Id.*, para. 79. Messrs. Marschner, Mann, and Samson are all experienced radio broadcasters who initially in-

tended to become owners in EVI. *Id.* They decided against such ownership, however, based upon their belief that it would weaken the applicant's comparative position. *Id.* The *I.D.* found that Mr. Marschner selected the communications counsel, helped prepare the business plan to answer the financial qualifications questions, and attended the planning sessions for the station (*Id.*, para. 80); that Mr. Mann participated in preparing the operating costs, selecting the antenna site, and choosing the applicant's engineer (*Id.*, para. 81); and that Mr. Samson helped select the engineer and put together the applicant's financial proposal (*Id.*, para. 82). Mr. Samson also furnished loans to EVI shareholders Martinez and Williams for them to purchase their stock. *Id.*, paras. 83-84.

34. The *I.D.* did not award any of these applicants 100% quantitative full-time integration credit. Rather, the ALJ faulted EBC for the way the applicant developed, the way it has operated thus far (pointing out certain provisions of the agreement to which its principals have not strictly adhered), and the critical fact that the limited partner has a vote equal to, or even greater than, the general partners. *Id.*, paras. 124, 130. He also faulted Best-Evergreen, observing that it cannot be said realistically that the Buenzles' ownership interests are as neatly divisible as they urge. *Id.*, para. 132. The ALJ noted, for example, that under state law and the corporate by-laws, Mr. Buenzle's position as an officer and a director of the applicant precludes him from holding merely a passive role in the applicant. *Id.*, para. 135. He concluded that, at best, control will be shared by the Buenzles. *Id.*, para. 136. And, with respect to EVI, the ALJ concluded that the current proposal of EVI fails to represent a true picture of the actual station proprietors. *Id.*, para. 140. Although he found that the four putative stockholders will participate at the station, he concluded that Messrs. Marschner, Mann and Samson will share in the operation of the station in light of the fact that their interest in the station is greater than that of the current owners, that they are the individuals with the broadcast experience, and that they have substantially participated and influenced the prosecution of the application. *Id.*, paras. 140-146. The ALJ declined to ascertain the precise percentage of credit to which the applicant would be entitled on the ground that it could not overcome others whom he believed were entitled to more credit. *Id.*, para. 147. Each of the applicants challenge the ALJ's failure to award it 100% full-time quantitative integration credit.

35. It is well established, of course, that the Commission may look beyond an applicant's putative organizational structure to determine true ownership and control. *See Caldwell Broadcasting Corp.*, FCC 86-245, released May 15, 1986 (Comm'n); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 421, 39 RR 2d 1099, 1103-1104 (Rev. Bd. 1977). The relevant area of inquiry is thus whether the record evidence concerning the various organization structures presented warrants confidence that the proposals are *bona fide*, and consistent with the purposes underlying the integration criterion. *See KIST Corp.*, 102 FCC 2d 288, 291, 58 RR 2d 1483, 1485 (Comm'n 1985); *Signal Ministries, Inc., supra*, at 1495, 60 RR 2d at 1710. The final determination stemming from this inquiry is predicated on the totality of the record evidence. *See Signal Ministries, Inc., supra*, at 1496, 60 RR 2d at 1710; *Louisiana Super Communications Ltd. Partnership*, 102 FCC 2d 1293, 1298, 59 RR 2d 761, 766 (Rev. Bd. 1985) (facts must be viewed as a whole in evaluating whether an applicant's purported structure is really a *bona fide* business arrangement). Moreover, the quantitative integration credit otherwise due to an applicant must be proportionally diminished to the degree the principals' *exclusive* authority to manage and control the applicant and operation of the station is reduced by the involvement of others. *See Signal Ministries, Inc., supra*, at 1495, 60 RR 2d at 1710. In our view, the ALJ carefully analyzed the record evidence and reached a reasonable and sound conclusion that none of the three proposals could be credited as structured.

36. EBC, however, charges that the ALJ minimized the roles played by the general partners in the formation and operation of the applicant, and asserts in a variant argument that the pre-organizational activities of its limited partner, Philip Tunis, cannot serve as a basis for inferring that the agreement will be violated. It argues, in this latter regard, that the limited partnership supersedes by act of law the pre-organization involvement of the partners; and emphasizes that the agreement clearly prohibits involvement in the partnership business by the limited partner. EBC claims that under the *KIST Corp., supra*, standard, its agreement must be considered to grant a *bona fide* ownership interest to the general partners. It also relies on *Broadcast Associates of Colorado*, 59 RR 2d 741, 743 (Rev. Bd. 1985), *modified on other grounds*, FCC 86-215, released May 9, 1986, for support that a principal is entitled to integration credit notwithstanding assistance in the preparation of the application.

37. At the outset, we disagree that the ALJ minimized the roles played by the general partners. The *I.D.* did not hold that the general partners would not work at the station as proposed, but instead focused on the activities of the purported *limited* partner in reaching its conclusion that the general partners would not have exclusive control over the station, as is necessary to receive 100% integration credit. Moreover, EBC is incorrect that the pre-organizational activities cannot be taken into consideration in determining whether the structure of the applicant is *bona fide*. As noted above, the Commission will examine all of the relevant facts in reaching a determination. *See Signal Ministries, Inc., supra., Louisiana Super Communications Ltd. Partnership, supra.* And in *KIST Corp., supra*, where the Commission fully credited a minority principal who had, as here, been incorporated into the application for comparative purposes by the party initially prosecuting the application, the Commission carefully examined the record evidence before concluding that the partnership agreement was a *bona fide* ownership arrangement. Unlike here, however, the party initiating the proposal in *KIST Corp.* remained the majority owner and was proposed to be integrated into the applicant, albeit on a part-time basis. The Commission rejected an argument there that the manner in which the principals came together was relevant, but noted that there may be circumstances where such facts are indeed relevant in determining the *bona fides* of an applicant's organization structure. *See id.*, 102 FCC 2d at 291 n. 8, 58 RR 2d at 1485-1486 n. 8. This is one of those cases.

38. The facts here are similar to those found in *Louisiana Super Communications Ltd. Partnership, supra.* There, the limited partner was found to be the moving force and controlling principal behind the applicant. 59 RR 2d at 764. And, as in this case, the general partners had discussed virtually every aspect of the application with the limited partner, but had followed his advice *in every instance*. *Id.* The Board concluded that the applicant's

representation that the general partner would have exclusive authority to manage and control the partnership business while the limited partner would play a passive, non-participating role was simply not credible. 59 RR 2d at 765. A similar result is dictated by the facts here. Moreover, *Broadcast Associates, supra,* cited by EBC, is inapposite. There, the principal's integration proposal was fully credited even though she had received assistance from her family and attorney in prosecuting her application. Unlike here, however, there was no indication in the record that she would not have exclusive control over the station.

39. Even assuming, *arguendo,* that the pre-organizational activities of Tunis were disregarded because they were superseded by the limited partnership agreement, EBC would still not be entitled to integration credit since the limited partner retains vital elements of control; for example, the limited partner can remove a general partner *without cause* with the vote of at least one general partner or with cause without the consent of any general partner (*I.D.* . para. 46); new general partners can be added only with the consent of the limited partner and at least one general partner (*Id.,* para. 47); and consent must be obtained from the limited partner before a general partner can voluntarily withdraw or resign from the partnership (*Id.,* para. 48); and the limited partner must give written consent before any of the general partners can assign, sell or otherwise dispose of any of his interest (*id.*). *See also paras.* 13-18 relating to the fatal Group Y limited partnership provisions. In sum, EBC is not entitled to any quantitative integration credit. *See Louisiana Super Communications Ltd. Partnership, supra,* at 1297 n. 2, 59 RR 2d at 765 n. 2 (the Board noted that in circumstances there the ALJ could have denied sham applicant integration credit altogether); *see also KIST Corp., supra,* 99 FCC 2d 173, 181-189, 57 RR 2d 49, 55-61 (Rev. Bd. 1984), *modified* 102 FCC 2d 288, 58 RR 2d 1483, *aff'd mem. sub nom. United American Telecasters, Inc. v. FCC,* No. 85-1663 (D.C. Cir. Oct. 15, 1986), and cases cited in para. 18, *supra,* relating to Group Y.

40. Best-Evergreen also challenges the ALJ's conclusion that it is not entitled to full credit, arguing that the ALJ gave undue weight to the change in its structure deleting Mr. Buenzle's participation at the station, the fact that he is a communications attorney, and the fact that he would serve as a secretary and director of the applicant. Additionally, Best-Evergreen asserts that Ms. Buenzle is entitled to full quantitative integration credit based on the Commission's spousal attribution policy. These exceptions are not persuasive. It is clear that the ALJ considered all of the record evidence concerning the Buenzles and concluded that Ms. Buenzle would not have exclusive authority over the control and management of the station. Moreover, Best-Evergreen does not dispute that Colorado law or the corporation's by-laws require Mr. Buenzle to assist in the management and control of the company. Although Best-Evergreen argues that Mr. Buenzle's positions as secretary and director are not more than an accommodation, it cannot now complain that the ALJ reached his adverse conclusion based, in part, on positions voluntarily selected by the applicant itself. In any event, it is clear from the record, taken as a whole, that the applicant has not demonstrated that Ms. Buenzle will possess exclusive authority over the control of the station. Further, the doctrine of spousal attribution is not apposite here. *See Absolutely Great Radio, Inc.,* FCC 86-250, para. 10, released May 16, 1986, (integration will be attributed only in joint tenancy situations: Best-Evergreen is not a joint tenancy). Best Evergreen will not be awarded any quantitative integration credit. *See N.E.O. Broadcasting Co.,* 103 FCC 2d 1031, 1032-1036, 60 RR 2d 125, 126-129 (Rev. Bd. 1986) (no credit awarded where sole shareholder wife was figurehead, and husband the controlling principal and moving force behind the applicant), *rev. denied* FCC 86-478, released November 4, 1986; *KIST Corp., supra,* (Rev. Bd.). *Las Americas Communications, Inc.,* FCC 86R-65, released November 25, 1986, where the Board ignored the post "B" cut-off *de jure* structure of applicant, concluded there had been no *de facto* change from "B" cut-off restructuring, and awarded the applicant the percentages sought prior to the "B" cut-off rather than discount all integration credit, is distinguishable because in that case, unlike here, there was no evidence that the remaining ostensible integrated owners would not be able to exercise the quantum of controlling leverage depicted in the paper organizational structure. *See also Signal Ministries, Inc., supra,* at 1493-1497, 60 RR 2d at 1709-1711.

41. Lastly, EVI claims the ALJ erred in not granting it 100% quantitative integration credit. It charges that the ALJ exaggerated the respective roles the three outsiders will have on station operations while underemphasizing those of the stockholders, pointing out, for example, that it was Ms. Mann who had the initial idea of filing the EVI application. It further argues that the ALJ's analysis suffers from a failure to distinguish input from decision-making and that there is no basis upon which to infer that the demarcation between input and legal responsibility would be breached in the future. EVI argues, too, that the ALJ improperly dwelled upon its restructuring to better comply with the Commission's comparative policy, and asserts that the rejection of its proposal conflicts with *Bellingham Television Associates, Ltd.,* 103 FCC 2d 222, 225-228, 59 RR 2d 978, 980-981 (Rev. Bd. 1986); and *Louisiana Super Communications Ltd. Partnership, supra.*

42. These exceptions will be rejected. It is clear from the record that the three outsiders played a significant role in the prosecution of the application. Mr. Mann, for example, took the lead role in finding an engineer and antenna site (F. Mann 1, 2); Mr. Marschner, along with his wife, selected EVI's communications counsel and helped prepare the business plan for the proposed station including construction and sales projections and likely expenses (R. Marschner 1, 2); and Mr. Sampson helped in choosing the applicant's engineer and in developing a financial proposal (Samson 4, J. Mann 8). Additionally, some idea of the state of mind of the outsiders can be gleaned from the response of Mr. Marschner to written cross-examination: "Very early in the process of preparing our application, we learned about the main points in the Commission's comparative hearing process. From that date on, we knew that, to have the best possible opportunity in the competition for the Evergreen construction permit, we needed to structure our application in a way that placed the ownership and management of the proposed station in the hands of Jean Mann and Cindy Marschner." (R. Marschner 5A and B).

43. The ALJ looked to the whole record in determining whether the proposal was a *bona fide* arrangement entitled to full integration credit and concluded that it was not in light of the outsider's past activities, broadcast experience, marital and credit relationships, and proposals

to work at the station. We find no basis to overturn his analysis. Finally, the cases cited by EVI do not dictate a contrary result. EVI claims that the level of involvement by the outsiders in this case is not comparable to those in *Bellingham Television Associates Limited, supra,* where we found a principal in control of an applicant. Nowhere, however, in *Bellingham* did the Board indicate that the involvement must be as extensive as that found there to discredit an integration proposal. And in *Louisiana Super Communications Ltd. Partnership, supra* , the Board credited an integration proposal where there was nothing but unsupported speculation to suggest that the limited partners would be other than passive investors. Here, in contrast, the outsiders will be employees of the station, two are married to EVI principals, all three have substantial broadcast experience versus the lack of broadcast experience for the principals, and they were significantly involved in initiating the application. No quantitative integration credit will be awarded to EVI. *See N.E.O. Broadcasting Co., supra; KIST Corp., supra,* (Rev. Bd.) discussed in para. 40 above.

44. *Interstate.* The tenth and final applicant is Interstate which does not propose to integrate any owners into its operation.

45. *Overall Comparative Analysis.* Three applicants have been awarded quantifiable full-time quantitative integration credit: Driggs--51%; ERI--50%; and Evergreen II--47%. With respect to the qualitative enhancements, Driggs is entitled to local residence and civic participation credit since Ms. Driggs has lived in Evergreen since 1963 and been actively involved in local civic activities. *I.D.* , para. 100. *See Policy Statement, supra,* at 396, 5 RR 2d at 1910. ERI, in turn, is entitled to its integration credit for Mr. Beall who has lived in Denver, Colorado, which is in the service area, for over 50 years and has been exceptionally well involved in Denver's civic activities. *I.D.* , para. 104. Mr. Beall will move to Evergreen if his application is granted. *Id.*, para. 103. Moreover, he was station manager of KFSC-AM, Denver from 1954 through 1974. *Id.* Thus, ERI is entitled to credit for Mr. Beall's service area residence and civic activities, broadcast experience, and proposal to move to Evergreen. Finally, Evergreen II receives its integration credit for Mr. Goodman's proposal. He lived in Evergreen from 1978 to 1980 and will return if his application is granted. *I.D.* , para. 87. Mr. Goodman has extensive broadcast experience reaching back to 1968 and has served as general manager of various facilities since 1975. *Id.*, para. 86. Evergreen II, thus, is entitled to credit for Mr. Goodman's past and proposed local residence and broadcast experience.

46. Based on these qualitative factors Driggs has a minor integration advantage over both ERI and Evergreen II since only her proposal reflects majority ownership, *see e.g. Faye & Richard Tuck, Inc.,* 103 FCC 2d 936, 944, 60 RR 2d 1167, 1172-1173 (Rev. Bd. 1986), and long-term local residence and civic activities, *see Vacationland Broadcasting Co., Inc.,* 97 FCC 2d 485, 492, 55 RR 2d 1299, 1306 (Rev. Bd. 1984) (subsequent history omitted). That integration advantage (even if enhanced for female ownership, but see para. 1 above) would be razor thin to begin with because of the small quantitative percentages separating the applicants--51%, 50%, and 47%. It would not be sufficient to allow Driggs to prevail overall comparatively because of the slight diversification demerit attributable to Driggs based on Delta's media interests. *See Radio Laredo, Inc.,* 87 FCC 2d 353, 362 n. 14, 49 RR 2d 1489, 1495 n. 14 (Rev. Bd. 1981) (subsequent history omitted) (media interests of option holder attributed to applicant); *see also Voce Intersectario Verdad America, Inc.,* 100 FCC 2d 1607, 1613, 58 RR 2d 445, 449 (Rev. Bd. 1985) (subsequent history omitted) (slight diversification demerit for distant aural facility). Delta owns a 51% interest in a construction permit for an FM station in Cheney, Washington, and Delta's principals control a cable television system in Carlsbad, California, and direct a substantial national television production business. *See Daytona Broadcasting Co., Inc., supra,* at 935 n. 8, 60 RR 2d at 1202 n. 8 (slight diversification preference outweighed slight integration preference).

47. The ultimate comparison comes down to two very similar applicants, ERI and Evergreen II. ERI, however, has a slightly higher quantitative integration credit reflecting at least negative control, *i.e.,* 50%. Moreover, that applicant has a slight advantage with respect to area familarity since Mr. Beall has lived in the service area for over 50 years and been exceptionally active in area civic participation. *See e.g., Ruth Payne Carmen,* FCC 86R-59, released October 1, 1986 at para. 2 recognizing longtime residence and civic participation in service area. Mr. Goodman's residence in Evergreen is not of comparable weight since it was for a short duration and did not include any significant civic activities. *Cf. Global Broadcasting Group, Inc.,* 94 FCC 2d 809, 812 n. 19, 54 RR 2d 404, 407 n. 19 (Comm'n 1983) (little weight accorded to residence which is not of several years duration). And the extensive broadcast experience of Mr. Beall and Mr. Goodman is essentially offsetting. *See North Carolina Radio Service, Inc.,* 92 FCC 2d 621, 52 RR 2d 993 (Rev. Bd. 1982), *rev. denied,* FCC 83-211, released May 3, 1983. ERI, thus, edges out Evergreen II on the comparative issue.

48. *Summation.* All decisionally significant exceptions have been considered. The short-spacing issue has been resolved adversely to Lord Broadcasting, and that applicant is disqualified. Except for the integration criterion, the applicants, in most part, are essentially equal. And, on the integration criterion, ERI is the superior applicant on the basis of its 50% full-time quantitative integration and enhancements credit. A grant of ERI's application will therefore best serve the public interest, convenience, and necessity.

49. ACCORDINGLY, IT IS ORDERED, That the contingent petition for leave to amend filed April 10, 1986, by Lord Broadcasting IS DENIED, and the amendment IS REJECTED; that the petition for leave to amend, filed June 11, 1986, by Evergreen Broadcasting Company IS GRANTED, and the amendment IS ACCEPTED; that the motion to strike filed May 6, 1986, by the Mass Media Bureau IS GRANTED; that the petition for leave to file response to reply exceptions of Lord Broadcasting, filed May 6, 1986 by Evergreen Ventures, Inc. IS DISMISSED as moot; and that the petition for leave to file statements pursuant to Disciplinary Rule 9-102(c) of the District of Columbia Bar, filed May 14, 1986 by Evergreen Ventures, Inc. IS DISMISSED as moot; and

50. IT IS FURTHER ORDERED, That the application of Evergreen Radio Inc. (File No. BPH-821217BG) for a new FM broadcast station at Evergreen, Colorado IS GRANTED, and the applications of Evergreen Broadcasting Co. (File No. BPH-821216AC), Best-Evergreen Broadcasting Company, Inc. (File No. BPH-821217AC), Lord Broadcasting (File No. BPH-821217AE), Evergreen Ventures, Inc. (File No. BPH-821217AI), Interstate Broadcasting System of Colorado, Inc. (File No. BPH-821217AO), Evergreen Broadcasting Corporation II (File No. BPH-821217AV), Group Y Communications Investment Partnership, Ltd. (File No. BPH-821217AZ), Evergreen Communications Company (File No. BPH-821217BC), and Janet Hunter Driggs (File No. BPH-821217BE) ARE DENIED; and the application of Payne Communications, Inc. (File No. BPH-820719AL) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-253**

Amendment of Section 73.202(b), RM-5271
Table of Allotments
FM Broadcast Stations.
(Minot, North Dakota)

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: November 18, 1986 Released: December 8, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rulemaking*, 51 Fed. Reg. 24172, published July 2, 1986, proposing the allocation of Channel 295A to Minot, North Dakota, as the community's fifth local FM service, at the request of Daryl M. Kasper ("petitioner"). Petitioner filed comments reiterating his intention to apply for the channel, if allocated.

2. Channel 295A can be allocated to Minot in compliance with the Commission's minimum distance separation and other technical requirements, without the imposition of a site restriction. Concurrence by the Canadian government has been received since Minot is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 295A to Minot since it could provide the community with additional radio service. In addition, as proposed in the *Notice*, we are amending the Table to Allotments to reflect the use of Channel 287 at Minot as a Class C1 facility. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Section 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22 , 1987, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Minot, North Dakota | 229, 246, 260, 287C1, 295A |

4. The period for filing applications for Channel 295A at Minot will open on January 23 , 1987, and close on February 23 , 1987.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-293**

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5432 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Georgetown, Texas) | |

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: October 30, 1986** **Released: December 8, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 25584, July 15, 1986, proposing the substitution of Class C2 Channel 243 for Channel 244A at Georgetown, Texas. The *Notice* was adopted in response to a petition filed by Georgetown Broadcasting Co., Inc., ("petitioner"), licensee of Station KGTN-FM, Channel 244A, Georgetown, Texas, which also requested the modification of its license to specify Channel 243C2. Petitioner filed supporting comments reiterating its interest in the channel substitution. Comments were also filed by Gold Broadcasting, Inc. ("Gold"), supporting the substitution. [1]

2. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction 10.0 kilometers (6.2 miles) northwest of Georgetown to avoid a short spacing to Station KSRR(FM), Channel 243, Houston, Texas.

3. We believe the public interest would be served by the substitution of Channel 243C2 for Channel 244A at Georgetown in order to provide that community with its first wide area coverage FM station. In accordance with Section 1.420(g) of the Commission's Rules we are herein modifying the license of Station KGTN-FM to specify operation on Channel 243C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's, Rules. IT IS ORDERED. That effective January 22, 1987, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Georgetown, Texas | 243C2 |

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KGTN-FM, Georgetown, Texas IS MODIFIED to specify operation on Channel 243C2 subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the proceeding IS TERMINATED.

7. For further information concerning this proceeding contact Patricia Rawlings, Mass Media Bureau,(202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] Gold, as the assignee in a pending application (File No. BALH-860522ED) for voluntary assignment of the license of Station KGTN-FM, states its intention to pursue the modification upon consummation of the assignment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-3

Amendment of Section 73.606(b), RM-4846
Table of Assignments,
TV Broadcast Stations.
(Holbrook, Arizona)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: November 3, 1986 Released: December 9, 1986

By the Acting Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 50 Fed. Reg. 5402, published February 8, 1985, issued in response to a petition filed by Metro Telecasting ("petitioner"), proposing the assignment of VHF Television Channel 6 to Holbrook, Arizona, as that community's first commercial television service. Additionally, the related offset change on Channel 6 from "minus" to "plus" at Kingman, Arizona, [1] was proposed to accommodate the proposal. Supporting comments were filed by petitioner reaffirming its intent to apply for the channel, if assigned. Reply comments were filed by the National Federation of Community Broadcasters [2] ("NFCB").

2. Holbrook (population 5,785), [3] the seat of Navajo County (population 67,629), is located in eastern Arizona, approximately 230 kilometers (140 miles) northeast of Phoenix. Currently, Holbrook has no commercial service and one vacant noncommercial educational television assignment.

3. As indicated in the *Notice*, VHF Television Channel 6 at Holbrook would require a site restriction 15.7 miles north of the community to avoid short-spacing to Station KUAT-TV (Channel 6), Tucson, Arizona, as well as a change in the carrier offset on Channel 6 at Kingman, Arizona.

4. In response to the *Notice*, NFCB acting on behalf of noncommercial educational FM Stations KSHI (Channel 215), Zuni, New Mexico, and KNNB (Channel 201), Whiteriver, Arizona, both of which are owned by Native American Tribes, advised that those stations would be severely limited in their future expansion efforts if Channel 6 is assigned to Holbrook in view of the new rules relating to noncommercial educational stations that have been adopted in Docket No. 20735, 50 Fed. Reg. 27954, published July 9, 1985.

5. NFCB adds that the proposed site of Channel 6 would place it in the center of four major Indian reservations whose groups are currently planning noncommercial educational stations in the area. It adds that in order to provide an adequate signal to its target audience, reservation based stations must operate with full facilities. This, it claims could not be accomplished if the proposal herein is adopted. Thus, NFCB requests that since ample spectrum space is available in the area, another channel be assigned to Holbrook for commercial purposes.

6. In order to resolve the conflict, a staff engineering study reveals that VHF Television Channel 11 can be assigned to Holbrook consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules, and without the necessity of an offset change elsewhere. Moreover, we believe in this instance, that Channel 11 may be preferable to Channel 6 at Holbrook since it could provide a first local commercial VHF television service without placing stringent limitations on noncommercial FM stations in the area.

7. Since Holbrook is located within 400 kilometers (250 miles) of the U.S.-Mexico border, concurrence in the proposal was obtained from the Mexican Government.

8. In view of the above, and having found no policy objection to the proposal, we believe the public interest would be served by assigning Channel 11 to Holbrook, Arizona, since it could provide a first local commercial television service to that community.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22, 1987, the Television Table of Assignments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

| City | Channel No. |
|---|---|
| Holbrook, Arizona | 11+, *18+ |

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information regarding the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] A construction permit was granted for Channel 6 at Kingman, Arizona, to Grand Canyon Television Co., Inc. conditioned on the outcome of this proceeding.

[2] Although NFCB's reply comments advanced new issues, we have accepted the reply in order to permit consideration of a potential technical problem. Petitioner was provided an opportunity to respond to the Channel 6 issue, but failed to do so. In view of our action herein assigning a VHF channel to Holbrook, we believe that no prejudice will result from the acceptance of NFCB's response.

[3] Population figures were extracted from the 1980 U.S. Census.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-194**

| | |
|---|---|
| Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Lampasas and Sunset Valley, [1] Texas) | RM-5386 RM-5519 |

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: October 30, 1986 Released: December 8, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 19864, June 3, 1986, proposing the substitution of Channel 256C1 for Channel 257A at Lampasas, Texas and the modification of the license for Station KLTD(FM) to specify operation on the new channel, as requested by the licensee, Ronald K. Witcher ("Witcher"). In response to the *Notice* a counterproposal [2] was filed by M&R Communications, Inc., ("M&R") requesting the allotment of Channel 256A to Sunset Valley, Texas, as that community's first local FM service (RM-5519). Petitioner filed supporting comments reaffirming his interest in the new channel and reply comments in response to the counterproposal. [3]

2. The proposal at Sunset Valley is short-spaced by 14.4 kilometers to Station KISS(FM), Channel 258, San Antonio, Texas. M&R suggested that the buffer zone for Station KISS(FM) be waived in order to accommodate its request. However, M&R failed to provide any documentation from the San Antonio station relinquishing its buffer zone. To the contrary, the petitioner in his reply comments provided a letter from Station KISS(FM) filed with the Commission on July 5, 1984, in which the licensee expressly requested therein that its buffer zone protection remain in effect until March 1, 1987. Therefore, the Sunset Valley proposal cannot be allotted in compliance with the Commission's minimum spacing requirements.

3. The substitution at Lampasas can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 35.6 kilometers (22.1 miles) south of the city to avoid short spacings to a construction permit for Station KWDC(FM), Channel 256, Denton, Texas and to Station KPSM(FM), Channel 257A, Brownwood, Texas. Since Lampasas is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained.

4. We believe the public interest would be served by the substitution of Channel 256C1 for 257A at Lampasas, Texas providing that community with its first wide coverage FM station. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KLTD(FM) to specify operation on Channel 256C1. [4]

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22, 1987, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Lampasas, Texas | 256C1 |

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLTD(FM), Lampasas, Texas IS MODIFIED, to specify operation on Channel 256C1 in lieu of Channel 257A, subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the petition filed by M&R Communications, Inc., (RM-5519) to allot Channel 256A to Sunset Valley, Texas, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530

FEDRAL COMMUNICATION COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] This community has been added to the caption.

[2] Public Notice of the Sunset Valley counterproposal was given on August 1, 1986, Report No. 1607.

[3] M&R filed late reply comments, which have not been accepted.

[4] In another proceeding there was a potentially conflicting proposal to substitute Channel 255A for 288A at Killeen, Texas in order to accommodate the substitution of Channel 290C1 for 292A at Belton, Texas (RM-5497). Petitioner, however, suggested an alternative channel for use at Killeen, thereby removing the conflict.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-21**

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5116 |
| Table of Allotments. | |
| FM Broadcast Stations. | |
| (Colby, Kansas) | |

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: November 13, 1986 Released: December 8, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 Fed. Reg. 4194, February 3, 1986, seeking comments on the allocation of Class C FM Channel 250 to Colby, Kansas as that community's second FM channel, at the request of The Bailey Corporation ("petitioner"). Petitioner filed comments reiterating its intention to apply for the channel, if allocated. No other comments were received. The channel can be allotted in compliance with the Commission's minimum distance separation requirements.

2. We believe the public interest would be served by allocating the channel as proposed since it could provide Colby with its second wide area coverage FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22, 1987, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the community listed below to read as follows:

| City | Channel No. |
|---|---|
| Colby, Kansas | 250, 262 |

3. The window period for filing applications on this channel will open on January 23 , 1987 and close on February 23 , 1987.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark Lipp
Chief, Allocations Branch
Policy and Rules Division

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 85-135**

In the Matter of

Licensing Space Stations in the
Domestic Fixed-Satellite Service

In the Matter of the Applications of

| | |
|---|---|
| National Exchange, Inc. | File Nos. 1824-DSS-P/LA-83<br>1825-DSS-P/LA-83<br>1826-DSS-P/LA-83<br>1827-DSS-P/LA-83<br>1828-DSS-P/LA-83 |
| RCA American Communications, Inc. | File Nos. 961-DSS-P/LA-84<br>962-DSS-P/LA-84<br>963-DSS-P/LA-84<br>964-DSS-P/LA-84<br>965-DSS-P/LA-84<br>966-DSS-P/LA-84<br>967-DSS-P/LA-84<br>968-DSS-P/LA-84<br>969-DSS-P/LA-84<br>970-DSS-P/LA-84 |

For Authority to Construct Launch
and Operate Space Stations in the
Domestic Fixed-Satellite Service

**ERRATUM**

**Released: DECEMBER 8, 1986**

On November 19, 1986, the Commission released a Memorandum Opinion and Order (FCC 86-497) in the captioned proceeding. This document extends the effective date of that action in order to satisfy the Federal Register 30-day notice requirement. The effective date is now January 5, 1987. Also, that document contained incorrectly sequenced footnotes. The correctly numbered footnotes are attached and should be associated with the text.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-136**

Amendment of Section 73.202(b) RM-5209
Table of Allotments,
FM Broadcast Stations.
(Huntingdon, Pennsylvania)

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: November 14, 1986 Released: December 8, 1986**

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 51 FR 15512, April 24, 1986, proposing the substitution of Channel 278A for Channel 292A at Huntingdon, Pennsylvania, at the request of Huntingdon Broadcasters, Inc. ("petitioner"). The *Notice* also proposed to modify the license of Station WRLR to specify operation on the new channel. Comments were filed by the petitioner and by Juniata College ("Juniata") to which the petitioner responded.

2. Petitioner sought the substitution of channels so as to allow it to relocate its transmitter to a mountain top site where it would be able to increase its facilities to maximum Class A, thus providing improved service to the community. As stated in the *Notice*, Juniata, licensee of Class D noncommercial educational Station WKVR-FM, currently operates on Channel 278A at Huntingdon and would be required to vacate the channel should the substitution be made. In its comments, Juniata states that it desires to continue providing service to both the college community and the city of Huntingdon through the operation of Station WKVR-FM as a full service facility. However, it believes that any available channels within the reserved portion of the FM band would encounter serious problems arising from the proximity of Channel 6 Station WJAC-TV at Johnstown, Pennsylvania. Therefore, it objects to the substitution of channels and modification of Station WRLR's license if Channel 292A is removed from the community but it supports the allocation of Channel 278A as a second channel allotment "provided that no protective umbrella be provided Huntingdon Broadcasters unless all interested parties receive such protection."

3. Petitioner supports Juniata's desire to operate Station WKVR-FM as a full service facility. To this end, it states that it has been working closely with Juniata exploring various methods by which it could continue to operate the station either on Channel 292A or on an educational frequency. Based on this support, petitioner believes that the basis for Juniata's objection has been removed. It therefore urges the allocation of Channel 278A to Huntingdon, the modification of its license for Station WRLR to specify the new channel, and the retention of Channel 292A for use by Juniata College.

4. We believe the public interest would be served by allocating Channel 278A to Huntingdon. The channel can be allocated in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.9 kilometers (1.2 miles) north to avoid short-spacing to unoccupied and unapplied for Channel 279A at McConnellsburg, Pennsylvania. We shall also modify petitioner's license for Station WRLR to specify Channel 278A in lieu of its present Channel 292A consistent with Section 1.420(g) of the Commission's Rules. See *Modificaiton of FM and TV Station Licenses* 98 FCC 2d 916 (1984). Contrary to Juniata's arguments, the license of Station WRLR can be modified even if no additional channel is available since the provisions of Section 1.420(g) apply only to those situations where an upgrade in class of channel is involved. However, in view of Juniata's stated intention to apply for use of Channel 292A should it remain allocated to Huntingdon, we see no reason to delete the channel. While we cannot modify its license since the rules in this regard apply only to full service stations, Juniata College, as well as any other interested party, may file an application for its use. Channel 292A requires a site restriction of 3.0 kilometers (1.9 miles) east to avoid a short-spacing to Station WNQQ, Channel 292A at Blairsville, Pennsylvania. Canadian concurrence in the allocation of Channel 278A has been obtained since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22 , 1987, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with regard to the following community:

| City | Channel No. |
|---|---|
| Huntingdon, Pennsylvania | 278A, 292A |

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Huntingdon Broadcasters, Inc. for Station WRLR, Huntingdon, Pennsylvania, IS MODIFIED effective January 22, 1987 to specify operation on Channel 278A in lieu of Channel 292A. The license modification for Station WRLR is subject to the following:

(a) At least 30 days before operating on Channel 278A, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301);

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620;

(c) Nothing contained herein shall be construed to authorize major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO: Huntingdon Broadcasters, Inc., P.0. Box 404, Huntingdon, Pennsylvania 16652

8. The window period for filing applications for Channel 292A will open on January 23 , 1987, and close on February 23 , 1987.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-60**

| | |
|---|---|
| Amendment of Section 73.202(b), Table of Allotments. FM Broadcast Stations. (Huntington, Texas) | RM-5152 |

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: November 14, 1986 Released: December 8, 1986**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 51 Fed. Reg. 6769, February 26, 1986, proposing the allotment of FM Channel 270A to Huntington, Texas, as that community's first FM service at the request of Robert D. Tindle ("petitioner"). Petitioner filed supporting comments reiterating his interest in the channel. The channel can be allotted to Huntington in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.

2. In view of the aforementioned, we believe the public interest would be served by the allotment of Channel 270A to Huntington, Texas, thereby providing that community with a first FM service.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22 , 1987, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the following community:

| City | Channel No. |
|---|---|
| Huntington, Texas | 270A |

4. The window period for filing applications will open on January 23 , 1987, and close on February 23, 1987.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 85-135**

In the Matter of

Licensing Space Stations in the
Domestic Fixed-Satellite Service

In the Matter of the Applications of

| | |
|---|---|
| National Exchange, Inc. | File Nos. 1824-DSS-P/LA-83 |
| | 1825-DSS-P/LA-83 |
| | 1826-DSS-P/LA-83 |
| | 1827-DSS-P/LA-83 |
| | 1828-DSS-P/LA-83 |
| RCA American Communications, Inc. | File Nos. 961-DSS-P/LA-84 |
| | 962-DSS-P/LA-84 |
| | 963-DSS-P/LA-84 |
| | 964-DSS-P/LA-84 |
| | 965-DSS-P/LA-84 |
| | 966-DSS-P/LA-84 |
| | 967-DSS-P/LA-84 |
| | 968-DSS-P/LA-84 |
| | 969-DSS-P/LA-84 |
| | 970-DSS-P/LA-84 |

For Authority to Construct Launch
and Operate Space Stations in the
Domestic Fixed-Satellite Service

## ERRATUM

**Released: December 11, 1986**

On November 19, 1986, the Commission released a Memorandum Opinion and Order (FCC 86-497) in the captioned proceeding. This document extends the effective date of that action in order to satisfy the Federal Register 30-day notice requirement. The effective date is now January 5, 1987. Also, that document contained incorrectly sequenced footnotes. The correctly numbered footnotes are attached and should be associated with the text.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

## FOOTNOTES

[1] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985) (*1985 Report and Order* ).

[2] Oppositions to NEX's Petition for Reconsideration were filed by Hughes Communications Galaxy, Inc. (HCG), GTE Spacenet Corporation and GTE Satellite Corporation (GTE Satellite), Federal Express Corporation (Federal Express) and Ford Aerospace Satellite Services Corporation (FASSC). In its petition NEX also requests reconsideration of our order denying its applications for a 12/14 GHz domestic fixed-satellite system. National Exchange, Inc., 103 FCC 2d 863 (1985) (*NEX Order* ). A response to NEX's Petition for Reconsideration was filed by Pan American Satellite Corporation (PanAmSat).

[3] RCA also requests reconsideration of our denial of its request for authority to construct, launch and operate a fourth 12/14 GHz domestic fixed satellite. RCA American Communications, Inc., 103 FCC 2d 852 (1985). Oppositions to RCA's petition were filed by FASSC and HCG.

[4] The Public Broadcasting Service (PBS), The National Association of Public Television Stations (NAPTS), and National Public Radio (NPR) filed joint comments supporting the views of Gannett and HBO.

[5] On February 21, 1986, National Exchange Satellite Inc. (NEXSAT), a company established after Burlington Northern, Inc. purchased 90 percent of NEX, filed the first of several pleadings pertaining to NEX's denied applications. In this *Order*, we deny NEXSAT's Motion for Acceptance of Amendment and Waiver of Cut-Off Rule, dismiss its Amendment, deny NEXSAT's application for review of the Common Carrier Bureau's decision to defer action on that amendment until this proceeding, and deny NEXSAT's Motion to Supplement its Petition for Reconsideration.

[6] Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983) (*1983 Processing Order* ).

[7] *Id.* at Appendix B.

[8] *Public Notice*, Report No. DS-265 (released March 12, 1984).

[9] Because there were more applications for space stations than orbital locations available, we believed the *Ashbacker* doctrine prevented grant of any of these applications before action was taken on the deficient ones. Ashbacker v. FCC, 326 U.S. 327 (1945).

[10] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 19413 (May 8, 1985) (*NPRM* ).

[11] The Commission noted that expediency in acting upon the applications was paramount because of the international considerations raised by the impending session of Space WARC. We noted that similar international considerations were identified in NAB v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) and supported concurrent consideration of applications and rulemaking issues. Because we found delay would disserve the public interest, we stated no extensions of time would be granted.

[12] Before the final rules were adopted in our *1985 Report and Order*, *supra* note 1, NEX filed a "Motion to Separate Rulemaking and Adjudicatory Proceedings and Request for Expedited Relief," requesting that we first adopt rules in a separate proceeding and then apply them to the applicants. On June 5, 1985, the Common Carrier Bureau denied NEX's request, explaining that the Commission's authority to apply interim application processing criteria pending the outcome of rulemakings is well-established. Licensing Space Stations in the Domestic Fixed-Satellite Service, Mimeo No. 4971 (released June 5, 1985) (*June 5 Order* ).NEX again opposed this two track

processing that required applicants to conform their applications during the pendency of the rulemaking procedure when it filed comments in the *NPRM*, and reiterated these arguments in an Application for Review of the Bureau's June 5 decision. In the *Report and Order*, we rejected NEX's procedural arguments, affirming the Common Carrier Bureau's denial of NEX's motion. *1985 Report and Order*, at paras. 29-41.

[13] In May, 1985, NEX scaled back its satellite system request, asking authority to construct, launch and operate two rather than four 12/14 GHz satellites, with a third satellite to be built as an on-ground spare. Based on NEX's inability to demonstrate its financial qualifications for its proposed three satellite system, its request was denied.

[14] 5 U.S.C. § 500 *et. seq.*

[15] 47 C.F.R. § 1.429(i).

[16] *1985 Report and Order*, *supra* note 1, at note 60 (emphasis added).

[17] *See* 47 U.S.C. § 308. ["The Commission, at any time after the filing of such original application . . . may require from an applicant . . . further written statements of fact to enable it to determine whether such original application should be granted of denied . . . ."]

[18] *1983 Processing Order*, *supra* note 6, at para. 4.

[19] *C.f.* Bilingual Cultural Coalition on Mass Media v. FCC, 595 F. 2d 621, 629-630 and note 34 (D.C. Cir. 1978).

[20] *See June 5 Order*, *supra* note 12, at para. 6.

[21] Petition at 15. NEX actually appears to concede that it was aware of our financial standards. It states that our *1983 Processing Order* "gave applicants reason to believe that conditioned construction permits *might* be issued to those not meeting the financial standards as of the date of the FCC's decision." Petition at 3 (emphasis added).

[22] In Domestic Communication Satellite Facilities, 35 FCC 2d 844, 850 (1972), the Commission stated that all domestic fixed-satellite applicants must demonstrate their financial ability to proceed with the implementation of their systems promptly upon grant. This was later affirmed and elaborated on in Domestic Fixed-Satellite Service, 90 FCC 2d 1, 2 (1982), and the 1983 *Processing Order*, *supra* note 6, at 1262.

[23] In 1983, the Commission issued licenses to three admittedly unqualified applicants based on their representations that they could arrange financing once they were issued construction permits. These authorizations were conditioned upon the companies obtaining requisite financing within a specified time. Failure to do so would render the authorizations null and void. Advanced Business Communications, Inc., 94 FCC 2d 1 (1983); Rainbow Satellite, Inc., 94 FCC 2d 437 (1983); United States Satellite Systems, Inc., 94 FCC 2d 462 (1983).

[24] In the *1983 Report and Order*, 54 Rad. Reg. 2d (P & F) 577 (1983), we stated that until that time we had not needed to discuss exhaustively the financial qualifications of domestic satellite licensees because the financial resources of past applicants had made it self-evident that they were fully capable of constructing and launching their proposed systems. *Id.* at para. 60. Rather than conducting lengthy hearings on financial qualifications of the three admittedly unqualified applicants in 1983, we issued conditional grants as an attempt to provide a more expedient test of an applicant's ability to finance its system. We emphasized, however, that this experiment was limited in scope, specifically, that we were "not opposed to trying [conditional authorizations] for the current group of applications." *Id.* at paras. 62-63. We also indicated our intention "to assess our experiences with [these] conditional grants to applicants who have not firmly demonstrated their [financial] qualifications to determine if our domestic satellite policy objectives have been furthered by [this] administrative approach." *1983 Processing Order*, *supra* note 6, at note 9.

[25] Advanced Business Communications, Inc., FCC 85-57 (released February 27, 1985), *recon. denied*, FCC 85-392 (released August 29, 1985); Rainbow Satellite, Inc., Mimeo No. 2583 (released February 14, 1985), *recon. denied*, FCC 85-393 (released August 29, 1985); and United States Satellite Systems, Inc. (released February 14, 1985), *recon. denied*, FCC 85-394 (released August 29, 1985).

[26] *1983 Processing Order*, *supra* note 6, at note 7. This approach would, in other words, deny all applications that did not demonstrate financial qualifications. We further stated that if, after employing various processing methods, there were more qualified applicants than orbital positions available to accommodate them, we might consider the possibility of holding evidentiary hearings. *Id.*

[27] As PanAmSat noted, international regulatory requirements make early showings of definitive financial arrangements impractical for private international satellite systems. Because these same constraints do not apply to domestic satellite systems we reject NEX's argument that the standards applied to international and domestic systems should be identical.

[28] We find that NEX's reliance on Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C.Cir. 1980) to support its claim that the Commission violated the APA is misplaced. In that case, the Court of Appeals held that OSHA was in error when it changed a codified policy and applied it retroactively without providing notice and an opportunity to comment. Here, however, contrary to NEX's claims, we did not effect an "about-face" from our *1983 Processing Order*, 93 FCC 2d 1260 (1983), nor did we adopt financial rules without benefit of notice and comment.

[29] *See* NAB v. FCC, 740 F.2d 1190 (D.C. Cir. 1984); Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972); Geostar Corporation, FCC 84-319 (released September 7, 1984). We find NEX's attempt to distinguish these cases unpersuasive. NEX argues that the first case did not operate to bar the grant of authority to applicants. This was not, however, the court's focus. In NAB v. FCC, the court stated that as long as the applicants had a full and fair opportunity to be heard, as have the applicants in this proceeding, that the procedures were acceptable. The second case did not simultaneously apply new standards to pending applications, but rather gave applicants advance notice of the standards and an undefined length of time within which to conform. In this proceeding, applicants also received notice of the standards and had 30 days in which to conform their applications. Finally, NEX agrees that the last case involves analogous procedures. We do not agree with NEX, however, that because no reviewing court has passed upon the questions of "fundamental fairness and due process," this case is not a proper precedent.

[30] 5 U.S.C. § 553(d) requires that publication of a rule shall not be made less than 30 days before its effective date except when, among other things, good cause is found and published with the rule. 5 U.S.C. § 553(d)(3). *See* Citizens to Save Spencer County v. EPA, 600 F. 2d 844, 879-891 (D.C. Cir. 1979).

[31] In support of this assertion, NEX states that the National Telecommunications and Information Administration (NTIA) contends in its comments regarding the *NPRM* that a few months of delay in granting satellite licenses would have procedural fairness benefits. NTIA did not, however, address Space

WARC considerations in its comments. We continue to believe that these considerations provided ample justification for the procedures employed in this proceeding.

[32] This concern, similar to the concern exhibited over DBS requirements for RARC-83, is consistent with the Commission's objective to have authorized systems to protect the U.S. interests in orbital locations at international conference. *See* NAB v. FCC, *supra* note 27.

[33] With respect to trade press reports of licensee delay in construction, we do not see why the possibility that some licensees will not meet the launch dates specified in their authorizations argues for a looser financial standard to be used. The conditional grant approach that NEX endorses has not only proven unsuccessful and time consuming, but would have been inappropriate for the last processing group because more applications were filed than available orbital locations. We continue to believe that strict financial standards with required construction milestones are the most effective mechanism to ensure that proposed satellites are timely constructed and launched. Any licensee failing to meet the implementation dates specified in their grants will have their authorizations revoked unless an extension of time request is granted due to circumstances beyond the licensee's control.

[34] On May 5, 1986, National Exchange Satellite, Inc. (NEXSAT), a wholly-owned subsidiary of NEX, filed a Request for Leave to File a Supplement to Petition for Reconsideration (Supplement). NEXSAT states in December 1985, 90% of the equity in NEX was acquired by Burlington Northern, Inc. (BNI). On February 21, 1986, NEXSAT filed an amendment to NEX's denied applications reflecting the transfer of control to BNI, BNI's commitment to the proposed satellite system, and BNI's financial qualifications under Section 25.391 of our rules. NEXSAT argues that because it is now able to demonstrate that it is financially qualified, there is an alternative ground for reconsideration of the denial of NEX's applications. We dismiss NEXSAT's supplemental petition for several reasons. First, permitting NEXSAT's amendment, filed some 7 months after the Commission took final action on its application, would impede the orderly processing of domestic satellite applications by precluding administrative finality and creating situations of mutual exclusivity. Additionally, permitting NEXSAT, in essence an entirely new applicant, to have its application processed as if it had been filed November 7, 1983 instead of on February 21, 1986 would be unfair to other applicants filing in the last group whose applications were denied, and to future applicants that will be considered in the next processing group. Finally, we note that two applicants, RCA and Columbia Communications, Inc., have petitioned for reconsideration and applied for court review, respectively, of the Commission's denial of their applications for 12/14 GHz band satellites. Indeed, RCA, like NEX, can argue that changed circumstances warrant a grant of its application. However, only one orbital location is currently identified as being available for a 12/14 GHz satellite. *See 1985 Assignment Order*, 50 Fed. Reg. 35228 (August 30, 1985). Thus, either permitting all applicants to submit curative amendments or allowing applicants that have petitioned for reconsideration to argue that changed circumstances warrant a grant of their denied applications, would lead to a mutually exclusive situation under current circumstances. For these reasons, we will not accept NEX's "curative" amendment.

[35] Moreover, other applicants, such as Martin Marietta, also proposed satellite designs using spot beam technology. Although the NEX design may be somewhat superior in terms of radiated power and receiver sensitivity, we found that this did not constitute sufficient grounds to waive our procedures when processing NEX's application.

[36] In fact, similar language was included in the nullification orders of Rainbow Satellite, Inc. and United States Satellite Systems, Inc., *supra* note 23. *See also* discussion regarding the regulatory flexibility analysis included in the *Report and Order* at paras. 29-34, *infra*.

[37] To demonstrate its financial qualifications, NEX asserted that it planned to raise $60.8 million through equity placement and $249.7 million through debt financing. An option agreement with BNI granted BNI an option to purchase up to 35% of the equity securities to be issued by NEX. There was also an agreement alluded to in a letter from a BNI officer that indicated a certain amount of debt financing would be forthcoming if approved by the Board of Directors. Arianespace was also to commit $55.86 million to the project if NEX could make the appropriate guarantees to a pool of European banks. *NEX Order*, *supra* note 2, at paras. 3-9.

[38] RCA American Communications, Inc., *supra* note 3. RCA had requested authorization for three additional 12/14 GHz satellites, two to be launched after 1990. Its request for the post-1990 satellites was denied on the basis of our policy that no authorizations would be granted in 1985 for satellites to be launched after 1990 since launches scheduled more than five years after authorization were too speculative and did not conform to our policy that licensees proceed expeditiously with construction and launch of authorized satellites. RCA does not seek reconsideration of this portion of the order.

[39] Opponents to RCA's petition point out that RCA provided no specifics regarding the committed capapity of its first two satellites. In response, RCA lists the customers to whom the capacity of its first 12/14 GHz satellite is committed, indicates that the capacity of the second is virtually committed pursuant to an agreement that would be signed shortly and reiterates its expectation that the capacity of its third satellite would likewise be filled.

[40] *See, e. g., 1983 Report and Order*, *supra* note 24, at para. 81; 1980 Orbit Assignment Order, 84 FCC 2d 584, 603 (1981).

[41] This policy has enabled orbital assignments in the last two processing groups to be made to new entrants as well as existing operators seeking expansion capacity.

[42] 50 Fed. Reg. 36071 at note 42.

[43] RCA American Communications, Inc., 94 FCC 2d 441 (1983).

[44] In fact, RCA urged us to adopt rules "relat[ing] solely to pre-launch activities or standards and not to the post-launch operational aspects of the satellite industry." RCA Comments at 10. The rule we adopted did just this.

[45] 5 U.S.C. § 553(b)(3).

[46] PBS, NAPTS and NPR filed comments supporting the HBO and Gannett petitions and especially urging the Commission, if it does not eliminate the rule, to adopt HBO's suggestion and provide a hearing opportunity to transponder owners and users as well as the satellite licensee before any relocation occurs. HBO asserts that this hearing will necessarily be long and complex.

[47] *1983 Report and Order*, *supra* note 24, at para. 84.

[48] Early satellite system planning often contemplated an in-orbit satellite that carried no regular traffic but was dedicated to be continuously available at a separate orbital location to back-up other satellites in the system in the event of an in-orbit failure. With increasing congestion of the geostationary orbit, this operational concept has become more difficult for the Commission to endorse. Other methods of planning for contingencies of in-orbit failures, such as marketing preemptible transponders or colocating in-orbit spares, are feasible. In addition,

we should not permit in-orbit satellites that have failed to achieve growth forecasts or have lost customers to competitors block entry by new applicants. We find such circumstances provide an allowable basis to review an operator's utilization of assigned orbital locations when we are considering new applications to launch satellites.

[49] *1985 Report and Order*, *supra* note 1, at note 41.

[50] It is not clear if this letter was filed as formal Petition for Reconsideration or as support for a pending petition. In any event, it is clearly untimely. *See* 47 C.F.R. § 1.429. Despite its procedural defects, we will nevertheless consider the letter as informal comments and will address the arguments raised by the SBA. *C. f.* 47 C.F.R. § 21.30(b),(c).

[51] The Commission's certification also referred to a more detailed discussion of the reasons why conditional grants and other alternatives suggested by the SBA were not feasible. *NPRM*, *supra* note 10, at para. 17. Thus, the certification was adequately supported. *See* Sargent v. Block, 576 F.Supp. 882 (D.D.C. 1983).

[52] The statute requires that an agency discuss the impact of its rule on small entities as well as describe alternatives to minimize such impact. *See* Small Ref. Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 537 (D.C. Cir. 1983). This analysis was conducted in the *1985 Report and Order*, *supra* note 1, at Appendix D. *See* para. 34, *infra*.

[53] Even NEX, one of the applicants found to be financially unqualified in 1985, has since been acquired by a large corporation and has relied on this transaction to demonstrate the necessary financial support for its system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WILLIAM M. RYAN File No. 33965-CL-P-167-A-86

For a construction permit to
establish a cellular system
operating on Frequency Block A
in the Domestic Public Cellular
Radio Telecommunications Service
in the Sarasota, Florida
Metropolitan Statistical Area

## MEMORANDUM OPINION AND ORDER

Adopted December 3, 1986; Released December 9, 1986

By the Common Carrier Bureau:

### A. Introduction

1. Gary F. Anderson (Anderson)[1] has filed a petition to deny the above-captioned application for the non-wireline construction permit for the Sarasota, Florida Metropolitan Statistical Area (MSA). The application of William M. Ryan (Ryan) was selected first in the lottery held for the market on June 27, 1986. The Commission announced Ryan as the tentative selectee in *Public Notice*, Report No. CL-86-339, released August 1, 1986. The petition is opposed by Ryan.

### B. Technical Qualifications

2. Anderson alleges generally that Ryan's engineering proposal contains "numerous errors." He then provides only one example. He states that the Cell 2 Height Above Average Terrain figure of 886.5 feet provided in Table MOB-3 of Form 401 is incorrect and should be 286.9 feet.[2]

3. Ryan admits that the correct figure is 286.9 feet. He notes that his error was both clerical and isolated in that it in no way is reflected in other parts of the application nor impacts on other calculations. In support, Ryan cites Section 22.23(g)(5) of the Rules, which permits an amendment to correct typographical or similar clerical errors clearly demonstrated to be mistakes by reference to other parts of the application. *See* 47. C.F.R. Section 22.23(g)(5). He states that by reference to the figures for the height above average terrain for each of the eight radials for Cell 2 the average Height Above Average Terrain (HAAT) for Cell 2 clearly is demonstrated to be 286.9 feet. Ryan also transmits an amendment correcting the Cell 2 average HAAT to 286.9 feet.

### C. Discussion

4. A tentative selectee in cellular markets below the top-90 may file minor amendments but no major amendments except those listed in Section 22.23(g) of the Rules. *See* 47 C.F.R. Section 22.918(b). Section 22.23(c)(1) of the Rules provides that the Commission will classify an amendment to an applicant's technical proposal as a minor amendment unless it results in a substantial change in the engineering proposal. Section 22.23(g)(5) allows major amendments to correct typographical or similar clerical errors which clearly are demonstrated to be mistakes by reference to other parts of the application.

5. Ryan's amendment does not result in a substantial change to its engineering proposal, and, even if the amendment were classified as a major amendment, the error in HAAT clearly has been demonstrated to be a clerical error by reference to other parts of the application.

6. The average HAAT for a cell is an average of the height above average terrain figures for the eight radials of the cell. In Cell 2 all eight figures are within the range of 275.8 to 298.1 feet. Thus, it is clear from the face of Table MOB-3 that the stated average HAAT for Cell 2 of 886.5 feet is in error. When the eight figures are averaged, they equal an HAAT of 286.9 feet. Moreover, all other calculations support Ryan's claim that the error in average HAAT is clerical. The height above average terrain figure for each radial, from which the average HAAT for Cell 2 is derived, is corroborated as correct. The radial figure is calculated by subtracting the average terrain along the radial from the transmitting antenna's height of radiation center above mean sea level. For each of the eight radials the difference between the stated antenna radiation height and the stated average terrain equals the stated height above average terrain for the radial. In sum, the average HAAT figure of 886.5 feet for Cell 2 is clearly demonstrated to be a mistake by reference to other parts of the application, and Ryan's amendment to correct the average HAAT figure to 286.9 feet is permissible.[3] Further, as Ryan notes, the error in no way impacts on other calculations.

7. After careful review of the application and the related pleadings, we find William M. Ryan to be legally, technically and otherwise qualified to be a Commission licensee.

### D. Ordering Paragraphs

8. Therefore, for the foregoing reasons, IT IS ORDERED, That the application of William M. Ryan, File No. 33965-CL-P-167-A-86, IS GRANTED effective on the release date of this order. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the FCC and any required marking and lighting specifications have not been issued by the FCC.

9. The Petition to Deny filed by Gary F. Anderson IS DENIED.

10. IT IS FURTHER ORDERED, That all other non-wireline applications in this market ARE HEREBY DISMISSED.

11. This order is issued under Section 0.291 of the Commission rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

**FOOTNOTES**

[1] Anderson is an applicant for the non-wireline construction permit in Sarasota, Florida. Anderson was not selected as one of the top-ten ranked applicants in the June 27, 1986 lottery for the market.

[2] Anderson also raises objections to a Genesis settlement agreement it alleges Ryan entered. Ryan responds in its opposition pleading that it is not and never has been a party to the Genesis Agreement. The MCE Cellular Settlement Agreement and a Joint Settlement Agreement, to which Ryan and MCE are parties, were submitted to the Commission by Ryan on July 11, 1986 and were referenced in the *Public Notice* announcing Ryan as tentative selectee. Neither agreement contains the alleged "de facto transfer of control" language Anderson would have us find fatal.

[3] This is not a case of typographical error in one of the pre-lottery specified processing requirements enumerated at n.16 of the cellular lottery *Memorandum Opinion and Order on Further* Reconsideration, 59 Rad. Reg. 2d. (P&F) 407, 410 n.16 (1985). See, e.g., C.J. Communications, Order on Reconsideration, Mimeo No. DA 86-228, released November 19, 1986. In those circumstances, even so-called typographical errors, such as listing the wrong market number on the title page, have resulted in rejection of the application.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Reclassification of Class B
and C FM Broadcast Stations
Which Do Not Meet Certain
Minimum Antenna Height and/or
Power Requirements.

**ORDER**

**Adopted: November 20, 1986 ; Released: December 9, 1986**

By the Commission:

1. The National Association of Broadcasters (NAB) on August 26, 1986, filed with the Commission, a petition for rule making and petition for emergency relief. Specifically, NAB requested that the Commission craft a *Notice of Proposed Rule Making* to review its decision in Docket 80-90 (48 Fed. Reg. 29486; published June 27, 1983) that would cause reclassification of FM broadcast stations on March 2, 1987, according to the station's actual facilities (power and antenna height) on that date.

**BACKGROUND**

2. The Commission, in Docket 80-90, created three new classes of FM broadcast stations. This action resulted from a desire to improve spectrum occupancy by reducing specified mileage separations between those stations operating at less than the maximum permitted facilities. Prior to Docket 80-90, stations were separated by mileages that protected the maximum available facilities for the class of station even if such stations were actually operating at considerably reduced levels. Interference protection distances in these cases were therefore larger than required. This had the effect of precluding additional stations from being authorized in unserved or underserved areas, even though the existing stations chose not to serve such areas or were prevented from ever doing so by height restrictions or other problems.

3. In addition to creating new classes of stations with mileage separations commensurate with facilities, the Commission added 696 new FM allotments to the Table of Allotments (FCC Rules and Regulations, Section 73.202). The new allotments were added to communities in which a channel was technically feasible and in which a need for service had been established. To ease final disposition of the Docket 80-90 allotments, the Commission instituted a freeze on accepting petitions for new allotments that were not direct counterproposals to the 696 allotments. This action permitted settling all Docket 80-90 proposals and counterproposals before granting of any other allotment requests that could conflict with the timely conclusion of Docket 80-90.

4. The Commission granted existing stations, not operating at full facilities, a three year period (beginning with the effective date of the *Report and Order* ) in which either to upgrade facilities or to accept a reclassification appropriate to the facilities actually being used. In addition, upon reconsideration (97 FCC 2d 279 (1984)) of Docket 80-90, the Commission granted a 16 kilometer "buffer zone" around those Class C stations having antenna heights of less than 300 meters above average terrain. This had the effect of increasing protection distances by 16 kilometers in all directions around those stations for the transition period.

5. NAB basically argues that with the availability of the 696 allotments from Docket 80-90 and with new allotments added through petitions to amend the Table of Allotments, "over 1,400 possible new facilities" have been created. NAB suggests that those opportunities must then be added to opportunities for new radio stations as a result of future expansion of the AM band. NAB points out that the Commission could even further increase opportunities for new service in its Docket 86-144 (51 Fed. Reg. 15 927; published April 29, 1986). That docket proposes allowing upgrading of facilities on the 20 channels now limited to Class A facilities. NAB also assesses that forced reclassification will result in "unprotected pockets of interference that will destroy service currently enjoyed by many listeners." NAB finally asserts that conflicting regulations have hampered upgrades, especially FAA air hazard limitations. All of these actions, according to NAB, should cause the Commission to reconsider the "balance" between the "burdens on broadcasters" and the "benefits of reclassification."

6. By letter dated October 8, 1986, National Public Radio (NPR) filed in support of the NAB petition. NPR pleads that although the reclassification was intended to affect only stations operating on the commercial channels, it also affects the 20 noncommercial channels. Specifically, Channels 218, 219 and 200 are directly affected by the new first, second, and third adjacent channel mileage separations. In addition, all noncommercial channels are potentially affected by commercial allotments removed by 53 or 54 channels.

**DISCUSSION**

7. We believe NAB failed to present a convincing argument to delay the reclassification of existing stations. In reaching its initial decision to reclassify stations after three years, and again upon reconsideration, the Commission considered all of the issues now being revived by NAB. The primary and overriding public interest goal remains allowing new service in areas now being incumbered by stations which have not built up to their full potentials. We recognize that licensees may have had to overcome obstacles to meet the timetable; but, many licensees have demonstrated the reasonableness of the three year period by having already achieved upgrading. Many others have filed applications and are prepared to construct after those applications are processed. Those that have not upgraded continue to underserve or not serve areas in which they are receiving protection from interference. Three years represents a substantial time period for any licensee to exercise several options. However, even in those "worst case" instances in which a downgrade occurs, licensees will continue to serve the primary audiences they had *chosen* to serve up to the point of the downgrade. Therefore we will not move to amend the three year period.

8. The NAB requests that if the three year rule is not extended, the Commission should consider waivers of the time period for those stations having shown diligence in their attempts to upgrade but which have encountered

obstacles in their attempts. Such an action "across the board" would be contrary to the underlying philosophy of the three year period and is similarly rejected.

9. Regarding the NPR request, we believe the same rationale applies regarding efficient use of the spectrum. Extension of the three year period only serves to prevent the addition of new stations in underserved areas. Consequently, we reject the NPR proposals.

10. ACCORDINGLY, pursuant to Sections 303 and 4(i) of the Communications Act of 1934, as amended and Section 1.401(e) of the Commission's Rules and Regulations, the petition for rule making and petition for emergency special relief filed by the National Association of Broadcaster is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

RKO General, Inc.
(Assignor)

to BALCT-860604KH

GTH-101, Inc.
(Assignee)

For Assignment of License of
Station WOR-TV, Secaucus,
New Jersey

**DECISION**

**Adopted: November 25, 1986 Released: December 9, 1986**

By the Commission:

**Introduction**

1. We now consider the application set out in the caption seeking our consent to the assignment of license of station WOR-TV (channel 9, Ind.), Secaucus, New Jersey, from RKO General, Inc. (RKO) to GTH-101, Inc. (GTH). We also consider several related matters: (1) a petition filed March 24, 1986, by Mr. Wilbert A. Tatum (Tatum), requesting modification of WOR-TV's license to specify that RKO not realize "windfall profits" from the sale of the station and that RKO be required to sell to a locally owned company[1] ; (2) a petition filed March 31, 1986, by Mainstream Television Limited Partnership (Mainstream) requesting, under section 73.3539(c) of the Commission's Rules, that we call for the early filing of WOR-TV's license renewal application,[2] and related pleadings[3] ; (3) Mainstream's application, contingent upon the success of its section 73.3539(c) request, for a construction permit for a new station to operate on channel 9, Secaucus, New Jersey, and a related waiver request; and (4) petitions to deny the RKO/GTH assignment application filed by Mainstream, Hill Broadcasting of New Jersey, Inc. (Hili), Multi-State Communications, Inc. (Multi-State), and related pleadings.[4] The State of New Jersey (New Jersey), by its Attorney General, initially filed a petition to deny the assignment application, but withdrew its pleading on August 22, 1986. Instead, New Jersey asks for the imposition of a condition on the grant of the assignment application. We shall consider that request below, along with Tatum's September 4, 1986 opposition to New Jersey's withdrawal of its Petition to Deny.

**Background**

2. The history of the RKO/WOR-TV proceeding has been set out in previous rulings,[5] and need not be detailed here. A brief summary will nevertheless be helpful in understanding the matters now before us. In 1974, the Commission designated for comparative hearing RKO's application for renewal of license of station WOR-TV and the competing application of Multi-State for a new station to operate on channel 9, New York City.[6] Other new applications had previously been filed against RKO's renewal applications for stations KHJ-TV, Los Angeles and WNAC-TV, Boston. The Commission subsequently found RKO to be the comparatively preferred applicant in the WOR-TV proceeding, but made the grant of its renewal application subject to the outcome of the Boston/WNAC-TV hearing.[7] In 1980, the Commission ruled that RKO was not qualified to remain the licensee of station WNAC-TV and, therefore, was similarly disqualified as the licensee of stations WOR-TV and KHJ-TV.[8] The Court of Appeals for the District of Columbia Circuit upheld the Commission's determination as to WNAC-TV, but remanded for further consideration the decisions with regard to WOR-TV and KHJ-TV.[9] [10]

3. Before the Commission acted on the court remand, Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982.[11] Section 355 of that law added a new section 331 to the Communications Act of 1934, as amended ("the Act"), which provides:

> It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed five years as provided in section 307(d) of the Communications Act of 1934.

RKO subsequently advised the Commission that it would change WOR-TV to a Secaucus, New Jersey station, if it received a five-year license. RKO's proposal qualified under section 331 because it was technically feasible to make such a change and because New Jersey lacked a commercial VHF television station. As a result, the Commission changed the television table of assignments (47 C.F.R. §73.606(b)) to move channel 9 from New York City to Secaucus, granted RKO a five-year license for station WOR-TV, and terminated the comparative proceeding between RKO and Multi-State.[12] The courts affirmed these actions.[13]

4. Contemporaneously with the reallocation of channel 9 to Secaucus and northern New Jersey, RKO sought a waiver of the main studio rule, 47 C.F.R. §73.1125. RKO had its main studio in New York City at the time, and it proposed to retain that studio temporarily. It stated that there were no suitable buildings in Secaucus and that it proposed to construct an extensive new studio there. It was reluctant, however, to spend in excess of $10 million for the new studio before the Commission's rulings became final, in light of the then-pending appeal. RKO described several steps it would take to assure that WOR-

TV would meet its primary obligation to Secaucus and northern New Jersey, instead of New York City, during the period of the requested waiver. These steps included retention of the station's Newark news bureau and the establishment of a Trenton news bureau. RKO also described changes in its programming so as to convert WOR-TV to a New Jersey outlet. The Commission granted the requested waiver,[14] but called for a report to the staff to assure that RKO's plans would be fully implemented. RKO filed a timely report and later provided supplementary information at the request of the staff. Based on the representations made and the information on file at that time, the staff believed that WOR-TV was then operating consistent with section 331 of the Act and took no further action.

5. As a result of our actions following the adoption of section 331 of the Act, WOR-TV's renewal cycle is unique. Its current, five-year license is set to expire on March 12, 1988. All other New York and New Jersey broadcast licenses expired on June 1, 1984,[15] and were renewed until June 1, 1989, where the appropriate public interest showings had been made. Ms. Sara Diaz Warren, however, filed an application for a construction permit for a new commercial television station to operate on channel 9, Secaucus, at a time when such an application would be entertained for any New Jersey television station except WOR-TV. The latter had a valid license at that time, there was no renewal "window," and the Commission rejected the application[16] as inconsistent with section 73.3516(c) of the Commission's Rules.[17] The court later affirmed that action without opinion.[18] With this background in mind, we turn to the applications and pleadings before us.

**Standing**

6. We shall consider Tatum's request for the imposition of conditions on the WOR-TV license as an informal request for Commission action under section 1.41 of our Rules. On August 4, 1986, Tatum amended his request to seek, in addition, dismissal or designation for hearing for the WOR-TV assignment application. He submitted that request well past the July 14, 1986 deadline established in this case by section 73.3584(a) of the Rules for filing formal petitions to deny. In his petition, Tatum failed to allege any facts to establish that he is a party in interest, within the meaning of section 309 of the Act. Accordingly, his petitions to deny will be dismissed. In our discretion, however, we shall consider those pleadings informally, under sections 1.41 and 73.3587 of the Rules.

7. Mainstream's sole general partner has submitted an affidavit establishing that she is a New Jersey resident and viewer of station WOR-TV. Hill's petition, which is also supported by an affidavit of one of its principals, states that Hill's controlling principals are residents of New Jersey, reside within WOR-TV's primary service area, and view the station. We find that these allegations are sufficient to establish that Mainstream and Hill are parties in interest within the meaning of section 309(d) of the Act. *See Petitions to Deny*, 82 F.C.C.2d 89, 98-99 (1980). We need not, therefore, address the other bases put forward by the petitioners to establish standing, or the applicants' opposing contentions. Multi-State claims standing on the ground that it is still an applicant for channel 9, New York City. It claims that its interest is viable because it is contesting the constitutionality of section 331 of the Act. However, its constitutional claims were rejected by the United States Court of Appeals for the District of Columbia Circuit,[19] and more recently by the United States District Court for the Southern District of New York.[20] Accordingly, Multi-State has failed to establish any interest in this proceeding and, therefore, it lacks standing. However, its contentions have been raised by other parties and, to that extent, its petition will be considered.

**Tatum's Petitions**

8. Tatum initially requested the imposition of two conditions on the WOR-TV license. He first asks for a condition to prohibit what he considers to be "windfall profits" on the sale of the station, because RKO benefited from the provisions of section 331 of the Act. The Commission, however, has not previously set nor generally become involved in the sales prices of broadcast stations,[21] leaving such matters to the marketplace. Section 331 by its terms does not suggest that a different policy should apply to licensees utilizing that section of the Act. As applied to WOR-TV, the goal of section 331 is to establish a VHF television station that is primarily responsive to the issues and concerns of Secaucus and northern New Jersey. That goal is the same for RKO and the proposed buyer, GTH. Tatum has failed to establish any connection between the purpose of the statute and the sales price of the station, and we are not aware of any such nexus. We believe that the public interest is served by our existing policy, and conclude that Tatum has provided no basis for changing that position in this case.

9. Tatum also seeks a condition that would limit the assignment of WOR-TV only to "New Jersey based interests." Granting that request is prohibited by section 310(d) of the Act, which specifically states that when reviewing assignment applications, we "may not consider whether the public interest . . . might be better served by the . . . assignment . . . of the . . . license to a person other than the proposed . . . assignee."[22] Congress did not alter this clear directive when it adopted section 331 of the Act. Nor do we perceive any other public interest reasons that would justify limiting the assignment of the station WOR-TV license to New Jersey interests. We therefore reject Tatum's request for the imposition of this second condition.

10. Tatum alternatively requests that the RKO assignment application be dismissed or denied, because the application does not meet the two conditions he proposes. There is no reason to hold a hearing on matters not currently required by the Commission and that, as noted, are inconsistent with the statute and the public interest. The matters alleged are simply not material issues, within the meaning of section 309(d) of the Act. Accordingly, for the reasons stated in paragraph six, above, Tatum's petition will be dismissed. The merits of the arguments, when considered informally, are denied.

**Mainstream's Pleadings**

11. We now address the three related matters filed by Mainstream: (1) an application for a construction permit for a new television station to operate on channel 9, Secaucus, New Jersey; (2) a request that RKO be required to file a renewal application for station WOR-TV, and the RKO and Mainstream applications set for comparative hearing; and (3) a petition to deny the RKO/GTH assignment application. The primary emphasis of Mainstream's pleadings[23] is on RKO's conduct established in the WNAC-TV/Boston proceeding and alleged in the

KHJ-TV/Los Angeles proceeding. Issues relating to three broad areas of RKO's conduct are involved: misrepresentations or lack of candor; destruction or suppression of relevant evidence; and defrauding advertisers.[24] For reasons that will become apparent below, we believe that the allegations in the case before us must be reviewed under two standards: one applying before and the other after March 12, 1983, the date of our action granting RKO's current five-year license for station WOR-TV.

12. *RKO's Conduct Before March, 1983.* As noted in the background information set out previously in this decision, we denied RKO's application to renew the WOR-TV license the last time we considered that subject. The court, however, later remanded the WOR-TV proceeding to us for further consideration, stating:

> [I]ndividual stations have different broadcast histories and policies. Although the FCC found that WNAC in Boston had a "mediocre to poor record with respect to news, public affairs, and local programming," . . . it made no new findings with regard to KHJ in Los Angeles and WOR in New York City. These stations are entitled to appear directly before the Commission and to argue that they deserve different treatment . . . .

*RKO General, Inc. v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981). As noted, before we acted on that remand, Congress adopted section 331 of the Act.

13. It is clear from the legislative deliberations that Congress was aware that one of the stations most likely to move to New Jersey was WOR-TV. The legislative history on this point is set out in *Channel 9 Reallocation (WOR-TV)*, 53 R.R.2d 469 (1983). For example, in a letter dated August 5, 1982, to Congressman John Dingell, Chairman of the House Energy and Commerce Committee, eight congressmen characterized the then-pending legislation as follows: "What this means is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there." *Id.* at 472 n.5. We also note that the statute adopted, quoted in full in paragraph three, above, compels no licensee to change its city of license. Instead, the new law sought to create an inducement to licensees to move to a location in a State without a VHF outlet.[25] The statute provides that, upon appropriate notification by a qualified licensee, "the Commission shall, notwithstanding any provision of law, order such reallocation and issue a license for that purpose . . . ." That language gives us no discretion. Significantly, Congress viewed the public interest in providing a VHF outlet for an unserved state as so great that, unlike every other action taken by the Commission, we are not independently required to make a public interest finding to support the relocation.

14. Denial of license renewal was clearly an option that had been available to us in reviewing the WOR-TV record in accordance with the court's instructions on remand. In these circumstances, RKO would have had no inducement to volunteer to move to New Jersey if it knew that its newly acquired license would be immediately subject to challenge based on new or better evidence of a violation that the Commission had already found disqualifying, or that additional qualifications issues could be immediately raised on any new ground that might be uncovered, with respect to activities occurring before the issuance of the new license.[26] The absence of such an inducement to move, Congress' awareness that RKO might seek to move to New Jersey, and Congress' decision to omit a public interest finding in section 331, lead us to the conclusion that Congress intended to give a "clean slate" to any qualifying licensee that volunteed to move. *See RKO General, Inc. (WOR-TV)*, 92 F.C.C.2d 1473, 1475 n.7 (1983). We conclude, therefore, that to the extent petitioners rely on allegations or evidence of RKO conduct before the issuance of the existing WOR-TV license, such matters are not subject to our review in this proceeding.

15. *RKO's Conduct After March, 1983.* Mainstream has not generally organized its presentation to differentiate between conduct arising before the grant of the current WOR-TV license and conduct occurring after that date. With regard to post-grant conduct, however, we understand Mainstream's pleadings to refer to allegations in the KHJ-TV proceeding as to fraudulent billing by RKO with respect to its radio network sales (some of which occurred before and some after March 12, 1983), and to two issues specified by the ALJ concerning possible lack of candor or misrepresentations to the Commission. One of these issues is based on a deposition of RKO's controller, Mr. John B. Fitzgerald, and the other concerns statements relevant to a December 5, 1983 "Motion to Compel Production of Documents." The resolution of these issues awaits the ALJ's initial disposition of the case.[27]

16. We first consider the application to this case of the *Grayson* policy and its more recent restatement in our *Character* proceeding.[28] In *Grayson*, the Commission stated:

> [I]f the Commission designates a license application of a multiple owner for hearing, the Commission will simultaneously decide whether that applicant can sell other stations. In making that decision, the Commission will apply the same standards it has applied in the past. While there are no hard and fast rules on these character questions, the basic issue will be whether there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations. If, after considering all the particular facts and circumstances, the Commission concludes that there is a substantial likelihood that the allegations bear upon the operation of other stations, it will take appropriate action to advise the broadcaster that assignment applications will not be entertained. If the Commission does not in some way express any limit on a multiple owner's right to sell its other stations, the broadcaster will be free to assign them (subject, of course, to normal processing standards concerning legal, financial, technical and other matters).

79 F.C.C.2d at 940. The limitations referred to included imposing conditions on the grant of the renewal applications of other commonly owned stations. In *Transferability of Broadcast Licenses*, 53 R.R.2d 126 (1983), the Commission stated that it would no longer impose such conditions. Instead, "the Commission will either designate the owner's other stations for renewal hearing or permit them to be transferred freely. . . ." *Id.* at 127.

17. The *Grayson* policy, as modified, reflects a balance. "Permitting a licensee with a station in hearing on character issues to sell another station may encourage or otherwise reflect a tolerance of wrongdoing." *Grayson*, 79

F.C.C. 2d at 938. On the other hand, deferral of action on an assignment application may adversely affect service to the public:

> The licensee will probably be reluctant to invest any new resources or effort in improving service after it has negotiated a deal with the buyer. The performance of employees at the station to be sold may also be impaired if they are asked to work for a considerable time under an employer who has announced its intention to leave the station; employees may justifiably feel that the licensee is no longer interested in maintaining good service or in rewarding employees who excel in their jobs.

*Id.* at 939.

18. Mainstream contests the applicability of the *Grayson* policy to this case. We agree with Mainstream's contention that the issues in the KHJ-TV proceeding are substantial and material, and with its statement that the adoption of section 331 of the Act did not automatically "immunize a licensee from the effects of misconduct arising after the grant of a license" pursuant to that statute. We disagree, however, with its contention that the *Grayson* policy is not applicable and its statement that "no assignment of the WOR-TV license could be permitted under the statute until KHJ-TV proceeding is resolved and the effect of any adverse findings on RKO's qualifications to be the WOR-TV licensee assessed." The *Grayson* policy is specifically intended to permit such sales in appropriate circumstances.[29]

19. In acting on assignment applications, the touchstone is the overall public interest, not solely the qualifications of the seller. In fact, even when dealing with a single-station licensee, transfers have been permitted despite hearings on basic qualifications, in appropriate circumstances. *See, e.g., Pape Television Co.*, 25 R.R. 64a (1963) (revocation proceeding terminated, where all of the licensee's stock would be transferred to four trustees). We emphasize that the focus of Mainstream's pleading is the seller, not the buyer. With that in mind, and contrary to Mainstream's contentions, we do not believe that section 309 of the Act automatically compels a hearing on RKO's or any other seller's qualifications in all cases. Furthermore, we disagree with Mainstream's assessment that weighing other public interest factors, such as reflected in *Pape* and *Grayson*, improperly denies a petitioner a "right" to a hearing, when the public interest is better served by assigning a license promptly to a new, qualified party.[30]

20. Nor does permitting an assignment of license under *Grayson* create a "property right" in the license within the meaning of section 304 of the Act, as suggested by Mainstream. Section 304 provides: "No station license shall be granted by the Commission until after the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency . . . as against the regulatory power of the United States because of the prior use of the same. . . ." If the grant of the WOR-TV assignment application will serve the public interest, as defined by our Rules and policies, including the policy set out in *Grayson*, our approval of that application creates no greater "claim to the use of any particular frequency" than is the case when acting on any other assignment application. Accordingly, we reject Mainstream's contentions on this point.

21. RKO takes the position that the WOR-TV license is fully transferable, because the Commission put no limits on the transfer of that license when it designated the various RKO renewal applications for comparative hearing.[31] Mainstream, in contrast, contends that there was no affirmative determination that the WOR-TV license would be transferable and that the statute requires such an express finding. Mainstream reasons that other parties would have been able to comment on or oppose such a finding, and that silence on that point denies meaningful participation to interested parties. We disagree with Mainstream. First, there is nothing in our rulings that requires such a finding. We stated, for example: "If the Commission does not in any way *express* any limit on a multiple owner's right to sell its other stations, the broadcaster will be free to assign them (subject, of course, to normal processing standards concerning legal, financial, technical and other matters)." *Grayson*, 79 F.C.C.2d at 940, emphasis added. *See also Transferability of Licenses*, 53 R.R.2d at 126. There were no express findings to limit the transferability of the WOR-TV license when we granted that licensee, or in any of the subsequent hearing orders, so that it could later be "transferred freely and without condition." No party previously challenged the absence of a limit on the transferability of the station WOR-TV license. *Id.* Therefore, under established policy, RKO was entitled to rely on the absence of an express limitation on the transfer of the license. Second, contrary to Mainstream's position, such a procedure is consistent with the statute. We are not required by the Act to make express findings as to any subject that might potentially be raised in connection with the processing of an application. Subsection 309(d)(2) of the Act requires us to consider the application, the pleadings and other matters we may officially note. If we determine that a petition should be denied, then the statute requires us to "issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." Accordingly, under the statutory procedure, if a petition discusses a substantial issue, we are required to review the information before us on that issue, along with all other matters we normally review when passing on the merits of an application. We are required, however, to make an express statement of findings only with respect to the issue raised by the petitioner. In the RKO proceedings, no party raised the question of transferability of the WOR-TV license. There was no need, therefore, to discuss the issue as to the transferability of the station WOR-TV license under the statute.

22. In any event, we believe a determination to permit a sale is amply supported, both in terms of the applicability of established policy and as an issue of what will now best serve the public interest. First, in *Grayson* itself, the matters in issue were lack of candor or misrepresentation, deliberate violation of the main studio rule, fraudulent billing, and program log falsification and/or fabrication. *Grayson*, 79 F.C.C.2d at 936-37. Those issues, like the issues facing RKO regarding matters arising after March, 1983, were serious matters, yet the transfer applications for other commonly owned stations were granted. The fact that serious questions may be unresolved, therefore, does not bar the assignment at issue here.[32] Nor do we believe that deterrence of wrongdoing will suffer if a transfer is permitted in this case. Even by permitting this assignment, RKO runs the potential risk of loss of all or some of its licenses other than WOR-TV. This provides an ample means for us to provide a significant deterrent to

wrongdoing.[33] Moreover, as required by the court in *RKO General, Inc. v. FCC*, 670 F.2d at 237, any adverse findings that affect the station WOR-TV license would have to be weighed along with findings as to station WOR-TV's programming record. Such a record is not part of any of the pending RKO hearings. The delay inherent in making that record raises all of the potential shortcomings in service to the public set out in *Grayson*, as quoted above in paragraph 16.[34] Finally, none of the matters now in issue in the KHJ-TV proceeding directly involve the day-to-day operation of station WOR-TV. The pleadings in this case show that the misrepresentations/lack of candor issues do not directly implicate the station, and the individuals involved have duties primarily with regard to overall corporate operations, not the day-to-day operation of station WOR-TV. The fraudulent billing issue goes to RKO's former radio network and possibly radio stations, and does not involve television operations at station WOR-TV.[35] Accordingly, we find that there is no " *substantial* likelihood that the allegations [would] bear upon the operation of" station WOR-TV. *Grayson*, 79 F.C.C.2d at 940, emphasis added.

23. Under the *Grayson* policy, we also retain the discretion to "take appropriate action against the broadcaster's other stations at a later point if the circumstances warrant: *i.e.*, if the hearing record ultimately discloses that the misconduct was more serious than initially believed." *Id.* Limiting our review to matters arising after March 12, 1983, there is nothing in the pleadings submitted here that warrants a ruling barring the sale due to the unresolved issues as to RKO's qualifications now under review in the KHJ-TV proceeding. In making such a judgment, we emphasize that implicit in the *Grayson* policy is a balancing of a number of public interest factors including the deterrent effect of the action on compliance with Commission rules and policies generally, the advantages of removing from the broadcast sphere a licensee that may not have the requisite qualifications, the cost to the public in terms of the service it receives as a consequence of the uncertainties that are likely to exist during an extended period when the issues are unresolved,[36] the costs to the administrative system itself in terms of prosecutorial resources, the legitimate rights and expectations, if any, of other litigants and parties to the proceeding, and the ultimate issue as to how the public may best be served. Additionally, there is nothing in the course of the RKO proceedings that provided Mainstream with a legitimate expectation or claim that it would be entitled to compete for the license while it was still under a cloud, rather than after that cloud had been removed. As we have indicated, we see no reason to believe that grant of the transfer will unacceptably diminish the incentives that exist for compliance with Commission rules and policies. On balance, upon consideration of all the circumstances of this case, we believe that the public interest would be served by permitting the assignment of license to a new, fully qualified party.[37]

**Mainstream's Request to Invoke Section 73. 3539 (c) and Its Tendered Application for a Construction Permit to Operate on Channel 9, Secaucus**

24. Section 73.3539(c) of the Commission's Rules provides that the Commission may call for the early filing of a renewal application where it "regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation. . . ." Mainstream requests that we call for the early filing of WOR-TV's renewal application, pursuant to the rule. We have stated, however, that we would not call for the early filing of a renewal application "absent some compelling reason." *Sioux Empire Broadcasting Co.*, 9 F.C.C.2d 683, 684 (1967). The matters alleged by Mainstream, as described above, concern unresolved issues as to RKO's activities after the issuance of station WOR-TV's license in March, 1983. We do not consider such unresolved issues to be "compelling circumstances." Therefore, they do not provide the basis for departing from our normal procedures. Moreover, the only reason to call for the renewal application would be to conduct a hearing, a result we have concluded would not serve the public interest in this case.

25. In reference to its tendered application (ARN-860331KQ) for a construction permit, Mainstream cites *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), for the general proposition that competing applications are viewed with favor under the law as a competitive spur to good licensee performance. That case ruled only that the Commission could not close a "renewal window" that would otherwise be open to applicants for the filing of construction permit applications for new stations to compete with renewal applications filed by RKO for all its stations other than KHJ-TV and WOR-TV. The court did not establish an open season for the filing of competing applications at any time during the station's license term. *See generally City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 662-64 (D.C. Cir. 1984). There is no basis at this time for accepting new applications for channel 9, Secaucus. Mainstream's application is premature and will be dismissed. *See Sara Diaz Warren*, 55 R.R.2d 895, *aff'd mem. Warren v. FCC*, 755 F.2d 781 (D.C. Cir. 1984).[38]

**WOR-TV's Performance in Light of Section 331 of the Act**

26. *Standard of Review*. RKO states that in a typical case we do not review the performance of the seller when acting on assignment applications. In fact, it observes that the application form requests no information concerning the seller's programming. It believes, therefore, that a review of station WOR-TV's performance is not called for in this case. The petitioners, in contrast, believe that a review of RKO's service is needed, because RKO undertook to provide service to New Jersey as a prerequisite to obtaining the WOR-TV license under section 331. We believe that a review is in order here, in the same manner as in any other case where the licensee's performance is challenged. We fully expect broadcasters to be responsive to issues of public concern during the license term. Largely, the manner in which the licensee responds to those issues, either as a renewal applicant or seller, as here, is set out in the issue/programs lists required to be included in the station's public inspection file on a quarterly basis. We do not ordinarily call for such information in our licensing process. Rather, we look to the public to bring our attention to those instances where a licensee may not have adequately met its obligations. In this case, RKO removed itself from a comparative hearing in 1983 and was given a renewal by promising to become a Secaucus/northern New Jersey outlet under section 331, and to place a primary emphasis on the issues and concerns of Secaucus and northern New Jersey, instead of New York City. Therefore, we believe that RKO's performance is appropriately reviewed in the unique circumstances of this case, where the licensee has specifically

represented that it would serve as a New Jersey outlet under section 331, and where that performance has been challenged by petitioners. We emphasize, however, that our review is limited to determining whether RKO met its obligation to serve the issues and concerns of northern New Jersey. The uniqueness of this case arises from the different "community" to be served. Nothing in section 331 gives the Commission the right or obligation to second-guess the program content or the editorial discretion of this or any other licensee.

27. The Conference Report accompanying the legislation that adopted section 331 states in part:

> [Section 331] affirms the congressional intent that it is in the public interest for every State to have at least one VHF television station. * * * * It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved State under the terms of this section will move its studio and offices to and operate for the public benefit of the unserved State.[39]

In addition, Senator Bradley, the sponsor of the legislation, stated that the move was intended to provide a station operating in New Jersey "for the benefit of the people in our State." Further, he intended to monitor the performance of any such station "to insure that it is responsive to the needs of my State. This station will not be a New Jersey station in name only. It will serve the people of New Jersey."[40]

28. In light of the language of the statute and the recited legislative history, the Commission made the following observations:

> [W]e believe it would be appropriate to take steps toward carrying out this intention through a higher service responsibility within RKO's Grade B coverage area. "[In volunteering to move, RKO stated that it] believes that as New Jersey's only VHF station it will be desirable to orient the station's news and other informational programming to the entire region of New Jersey, which it will serve." Indeed, RKO states that its specification of Secaucus as the city of license would allow it to devote more time to the needs of its entire New Jersey coverage area since the needs of Secaucus could be readily satisfied. In contrast, RKO suggests that the local needs of a much larger city, such as Newark, would require more time to satisfy, at the expense of the needs of the rest of its northern New Jersey service area.
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> . . . Considering RKO's statements with regard to its programming expectations in conjunction with the clear Congressional intent, we anticipate that RKO's continued use of VHF Channel 9 will be directed toward satisfying the programming needs of its New Jersey Grade B coverage area. In the usual case, Secaucus, the city of assignment, would be the primary focus of the licensee's programming responsibilities. However, we have previously determined that the lack of local VHF television service to this highly populated area of northern New Jersey presented unique circumstances. [Citation omitted.] . . . Accordingly, we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee. At renewal time RKO will be judged by how it has met the obligation to serve the greater service needs of northern New Jersey, which we view as broader than the specific needs of Secaucus.[41]

29. There is a dispute between the applicants, on the one hand, and the petitioners on the other, as to the meaning of the phrases "higher service responsibility" or "higher degree of service." The petitioners take the position that the phrases mean that RKO/WOR-TV assumed a higher obligation to be responsive to the issues and concerns of the service area than would be the case for a licensee serving any other area. In opposition, the applicants contend that the "higher" level of service refers to the balance between providing service to the station's city of license in contrast to outlying areas. They agree that their obligation to serve outlying areas is "higher" than would be the case for any other station, but disagree that they are obligated to devote more time and resources than any other station to be responsive to the issues and concerns of the service area. The applicants are correct. First, their interpretation is certainly what we intended. Second, there is no indication in the statute, its legislative history or the language in paragraph 28 that states that a different, higher standard would apply under section 331 to the licensee's overall performance. Finally, the discussion as to the reasons for the choice of Secaucus, the reference to the unique needs of northern New Jersey, and the concluding paragraph of the material quoted in the preceding paragraph all clearly support this view. We therefore conclude that station WOR-TV's performance should be judged in the same manner as any other television station in it overall performance, except that its performance will be tied to northern New Jersey, not primarily Secaucus. We understand this to mean that WOR-TV should serve northern New Jersey in the same manner as a station licensed to Chicago, for example, serves that city.

30. As noted above, we do not ordinarily look at the seller's performance when acting on assignment applications. When that performance is challenged, however, we generally review the seller's performance in a manner similar to that of a renewal application. That standard is set out in *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), *reconsideration denied*, 60 R.R.2d 526 (1986). The renewal standard was the subject of considerable discussion in that proceeding, but the following excerpts are sufficient for the purposes of this decision:

> *Renewal Standard.* In general, the basic renewal standard will continue to consist of an obligation that a licensee, during its prior license term, addressed community issues with responsive programming and complied with all other legal requirements. A licensee need only have addressed community issues with whatever types of programming, that in its reasonably exercised discretion, it determined was appropriate to those issues. [98 F.C.C. 2d at 1093.]

In addressing challenges to a licensee's performance under that standard, we stated:

> *Petitions to Deny.* Individual licensees remain obligated to provide programming that is responsive to the community. Therefore, programming will remain a relevant issue in proceedings arising from petitions to deny. While overall programming remains a consideration in petitions to deny, eliminating the guidelines will affect the relevancy of certain types of programming issues. Since we are not concerned with the quantity of specified program categories, arguments based solely on the failure to present amounts of non-entertainment programming will not be appropriate. Petitioners raising programming issues will have to demonstrate that an individual station is failing to address issues facing the community in its programming. The focus of an allegation in this context should not be on the mere amount of programming presented. We have no wish to return to a simple quantitative approach.
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> The focus of our inquiry in the petition to deny context can be expected to be whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming.

*Id.* at 1093-94, footnotes omitted. Further, it is only when a petitioner has made out "a prima facie case that a licensee has been unreasonable" that the licensee is obligated to come forward with facts it believes will show that the exercise of its discretion was appropriate. *Id.* at 1094.

31. We also note the burden of pleading imposed on petitioners by section 309(d)(1) of the Act. They must allege specific facts that, if true, are sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest. Those allegations must either be matters that we can officially note, or be supported by affidavits from persons with actual knowledge of the facts alleged. As stated above, the general standard with respect to issue-responsive programming is that a petitioner must make a *prima facie* case that the licensee has been unreasonable.[42] We also note that some of the allegations raised by the petitioners in this case go beyond quantitative analysis of programming and involve editorial decisions. Because of the provisions of the first amendment and section 326 of the Act, this is an area where the licensee's discretion is particularly broad and the petitioners' burden of pleading commensurately heavy.

32. *The Petitioners Showing.* As noted in the recitation of the legislative history set out above, a licensee taking advantage of section 331 was expected to move its studios and offices to an unserved state. Petitioners fault RKO because it did not in fact begin operation from its Secaucus studio/offices until May 17, 1986, more than three years after the Commission reallocated the channel to Secaucus. What the petitioners fail to note is that the Commission expressly ruled that RKO had 15 months from the time the reallocation decision became final to begin operation from its then-proposed Secaucus facility.[43] The reallocation decision did not become final until after the Supreme Court denied *certiorari* on November 13, 1984. Fifteen months after that date falls in February, 1986. Because of unforeseen construction delays, RKO requested and the staff granted brief extensions, based on a showing that the new facility was substantially complete. Operation from the new facility began within the extended period. We see nothing in this sequence of events that is inconsistent with RKO's representations, our prior ruling or the public interest.

33. RKO also represented that it would establish a news bureau in the state capital, Trenton, interconnected with its main studio. RKO did this. One petitioner notes with apparent dissatisfaction that the news bureau rents space in the offices of the *Trenton Times*. The nature of the landlord or the location of the news bureau within Trenton are, however, irrelevant to any public interest factor we have ever expressed. Supported by appropriate affidavits, RKO additionally represents that its news department now employs between 65 and 70 persons, and that it has eight reporters and eight camera crews. These news crews use ten vehicles, five of which are equipped with electronic news gathering microwave equipment. RKO previously maintained a news bureau in Newark. RKO advises that the Newark news bureau closed when the station began operating from Secaucus. We do not believe that its closing is inconsistent with RKO's undertaking, given the relatively short distance (seven miles) between Newark and Secaucus. We believe that RKO has performed substantially as represented on these matters, and conclude that it has fully met the "physical presence" requirement underlying section 331.

34. With respect to programming, the petitioners have taken the position, disputed by RKO, that station WOR-TV does not do enough programming for Secaucus and New Jersey. We have expressly rejected the quantitative approach adopted by the petitioners. *See Commercial TV Stations*, quoted above in paragraph 30. Petitioners have not once mentioned the station's quarterly programs/problems list. They have not identified any issue they believe should be added to that list or, if listed, that has not been met by station WOR-TV's programming. Given that RKO's obligation to serve the issues and concerns of northern New Jersey is not different in kind or degree from any licensee's obligation to serve its community of license, except to the extent of geographical coverage encompassed in the area where issues and concerns are to be served, we rely here as in other cases on the issues/programs list. Petitioners have failed to demonstrate that the WOR-TV list shows a neglect of New Jersey issues. In this regard, therefore, petitioners have failed to meet their burden of pleading.

35. The move of station WOR-TV to Secaucus does mean that it should focus primarily on the issues facing Secaucus and northern New Jersey, not New York City. Our review of station WOR-TV's programming need be no more extensive than we generally undertake in reviewing whether the issues and concerns of a particular service area have been met. As noted above, we find that the petitioners have failed to show, based on the issues/programs list, that station WOR-TV is not responding to the issues facing northern New Jersey. Petitioners' allegations focus largely on quantitative assessments of weather, sports, and cultural affairs, which do not constitute issue-responsive programming and therefore are not relevant to our review. Moreover, in our judgment, the matters complained of represent the licensee's edi-

torial discretion. As such we shall not disturb them. Just as we would not purport to tell a licensee of New York City how much coverage it should devote to New York high school sports, neither will we intrude in the editorial discretion of a New Jersey station.[44] We conclude, therefore, that the petitioners have failed to allege facts that, if true, raise a substantial question that station WOR-TV has failed to place a primary emphasis on service to Secaucus and northern New Jersey.

36. *Station WOR-TV's Service to Secaucus and Northern New Jersey*. Because we have concluded that the petitioners have failed to allege a *prima facie* case on the grounds set out above, their petition is denied. Even if we were to review on our own motion the station's performance in this case, and even if we were to look beyond the issues/programs list, no different result would ensue. WOR-TV's news programs contain segments on sports, weather, features (business reports, movie/theatre reviews), international, national and local New Jersey news. That format is consistent with industry practices and with the representations made by RKO. There is nothing in section 331, its legislative history or our prior rulings as to station WOR-TV suggesting that such a format for a news program is improper or inconsistent with the public interest, and format decisions are matters fully within the editorial discretion of licensees. Public affairs programming similarly shows a regular flow of programs that treat New Jersey issues.[45] Public service announcements and editorials also deal with New Jersey issues and concerns.[46] [47]

37. *Conclusion as to Service*. The petitioners have identified no New Jersey issues that they believe should have been addressed, but were not. We find that the petitioners have not met their heavy burden and have failed to establish that the licensee has been unreasonable in the exercise of its considerable discretion. Applying the same standard of review we use for any licensee, therefore, we conclude that RKO has programmed for the benefit of northern New Jersey, which is the equivalent of another licensee's community of license. Although not necessary, we have nonetheless also considered the substantial information submitted by the petitioners and RKO. We find in the record examples of programming directed to the issues confronting Secaucus and northern New Jersey, including news, public affairs progams, editorials and public service announcements. The petitioners have alleged no decisionally significant facts to establish that the station still primarily serves the issues and concerns of New York City, rather than northern New Jersey. To the contrary, it is serving Secaucus and northern New Jersey. We conclude, therefore, that station WOR-TV has operated for the public benefit of the people of Secaucus and northern new Jersey, consistent with the mandate of section 331 and the public interest.

38. *Alleged Misrepresentations/Lack of Candor as to New Jersey Service*. The petitioners have suggested that RKO has not performed as represented in its 1983 statements concerning its planned move to Secaucus, and in its 1983 report to the staff describing how RKO had implemented its plans. The information and discussion above, for the most part, dispose of these allegations. The station's plans for its physical presence in the state were implemented. The station did in fact initiate its half-hour, evening news programs, as represented. RKO did cancel "New Jersey Report" which was mentioned in 1983, but states that other programs were initiated in its place as better serving the public interest. Such changes are well within RKO's discretion, however, and are not evidence of misrepresentation. In its report to the staff, RKO appended descriptions of five of its "News at Noon" programs, one for each day of the week, selected from five months. Petitioners contend that these programs are not typical. In our view, however, the petitioners have failed to raise a substantial question of misrepresentation. First, we do take representations as to service seriously, but we have recognized that "considerable flexibility and discretion [are] not only permitted but called for in the public interest." *KORD, Inc.*, 31 F.C.C. 85, 86 (1961). A licensee's decision to change specific programs or anticipated quantities of particular types of programming, by itself, simply does not constitute evidence of misrepresentation. Like any licensee, RKO's initial plans were in the process of evolving. *RKO General, Inc.*, 54 R.R.2d at 856. Finally, in 1983 RKO submitted the program descriptions as illustrative only, and made no specific commitments in connection with them. We cannot find misrepresentation or lack of candor in these circumstances.

**GTH's Proposed Service to New Jersey**

39. The buyer, GTH, is a wholly owned subsidiary of MCA Broadcasting, Inc., which, in turn, is controlled by MCA, Inc. (MCA). Among its other business interests, MCA is a major television program producer and syndicator. In view of this, Hill and Mainstream contend that GTH has failed to demonstrate that it can or will operate station WOR-TV as a New Jersey station. Hill asserts that:

> MCA has not evidenced any 'awareness' of its obligation to operate WOR-TV primarily as a New Jersey station. Indeed, in the exciting and unguarded moments following the announcement of its acquisition of WOR-TV, MCA made no secret of the fact that WOR-TV's value to the company is as a station targeted to the New York market.

Mainstream states that:

> The assignee . . . submits as Exhibit 7 of its portion of the application a two page Programming Statement which vaguely promises without specificity to provide service to New Jersey. Under the unique circumstances arising from Section 331 of the Act, this is patently inadequate, leaving substantial and material questions of fact as to whether MCA would provide service to New Jersey consistent with Congress' intent in adopting Section 331.

40. In its response, GTH declares that, in view of the recent completion of the $25 million facility in Secaucus, it will have an unparalleled physical presence in New Jersey, and that it will actively seek to provide quality news, public affairs and other programming to address New Jersey issues. GTH believes that its commitment to provide quality programming to New Jersey goes beyond the Commission's general programming requirements and those made applicable specifically to station WOR-TV.

41. GTH has stated its intention to serve the issues and concerns of Secaucus and northern New Jersey. Although the application form has not yet been amended to reflect revisions in Commission policy, GTH's narrative fully complies with the requirements set out in *Commercial TV Stations*, above. GTH is aware of its responsibilities. There is no reason to speculate that it will fail to carry out its

representations or to meet our requirements. In 1988, when station WOR-TV's renewal application is filed, GTH will run on the record it establishes in the intervening period. In that connection, Mainstream contends that GTH's "operations during any brief remaining portion of the license term would be operations 'under the gun' and hence of little weight in assessing the type of service [GTH] may ultimately provide." It cites *L. B. Wilson, Inc.*, 37 F.C.C. 511 (1964), *aff'd sub nom. Southern Florida Television Corp. v. FCC*, 349 F.2d 971 (D.C. Cir. 1965), and *United Broadcasting Co.*, 100 F.C.C.2d 1574, 1576-79 (1985), *National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985), in support of its position. The *National Black Media Coalition* case involved the use of employment data for EEO purposes in the period *after* the end of the normal license term. As such, the case is not apposite here. Mainstream characterizes *L. B. Wilson* as according less significance to a record compiled during four months where the licensee anticipated a comparative challenge. In GTH's case, however, the period involved will be well over a year, not four months. Further, Mainstream overlooks our subsequent decision in *Post-Newsweek Stations, Florida, Inc.*, 23 F.C.C.2d 946 (1970), where, in a comparative context, the Commission held that a renewal applicant could show the extent to which it had implemented its programming plans during the 65-day period following its acquisition of the license.

42. Finally, the *United* case involved a licensee that had its renewal application held in deferred status since 1969. In 1978, a competing application for a construction permit was filed against the renewal application during the appropriate filing period. The Commission held that its review of the station's programming service would be of the 1975-78 license term, not the entire period since 1969. We do not understand that case to mean, as apparently suggested by Mainstream, that a party can announce that it will file a competing application against a future license renewal application and thereby render unusable the licensee's service during the remainder of the license term. Such a course would place the period of review within the hands of the potential challenger and provide no incentive to the licensee to continue a substantial performance. Thus, we reject Mainstream's suggestion that GTH would not be permitted to rely on its service to Secaucus and northern New Jersey during the remainder of the station WOR-TV's license term, if a competing construction permit application is filed in 1988. In a sense, all renewal applicants are "under the gun." Although GTH will have held its license less than the full, five-year license term, it will have a substantial period on which to base its record, which will be accorded full weight.

**Alleged Undue Concentration and Market Power**

43. Hill further contends that GTH's acquisition of station WOR-TV would remove from the New York television market the last commercial VHF station not vertically integrated with a major program producer and syndicator. Hill states that "the implications are ominous for maintaining a diversified and competitive climate in the market." Thus, "new, small UHF stations and smaller, independent program producers and syndicators effectively would be shut out of the . . . market." Hill asserts that, during the 1940's, this type of vertical integration was found to violate the antitrust laws, citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

44. GTH, in opposition, asserts that Hill has not pointed to a Commission decision or a rule to support its contention that GTH's ownership of a single station would offend the Commission's diversity policies, nor can it because none exist. While the Commission "has adopted a variety of media ownership restrictions designed to preserve and promote diversity," GTH maintains that "all restrictions are based on the premise that certain degrees of *horizontal* integration of broadcast station ownership may present risks to diversification of program and service viewpoints," citing section 73.3555 of the Commission's Rules. While stating that its acquisition will promote the Commission's diversity policies, GTH notes that the Commission has recognized that vertical integration in broadcasting may increase efficiency, citing *Amendment of Section 73.3555*, 100 F.C.C.2d 17, 50 (1984). GTH asserts that even Hill recognized, in its petition, that the Commission has granted broadcast licenses to companies having major production operations.

45. We believe we can dispose of these concerns briefly. The acquisition of a station by a program producer or syndicator violates no Commission rule or policy. There are broadcast licenses already held by program producers and syndicators. The petitioners have not shown such common interests automatically violate any existing laws concerning monopolies or anticompetitive practices. The petitioners appear to take the position that the last corporation, GTH, to enter into the competitive northern New Jersey/New York City market should be held to a higher standard than corporations that entered the market earlier. We know of no such legal theory. In any event, determinations in these areas have been entrusted to the Justice Department and the Federal Trade Commission. We are not aware of any concerns expressed by those agencies as to the proposed acquisition. *See also Character Qualifications*, 102 F.C.C.2d at 1200-03. We conclude that the petitioners have failed to allege substantial and material questions of fact warranting Commission action.

**Withdrawal of the State of New Jersey's Petition**

46. New Jersey's petition raised questions as to whether GTH would primarily serve the needs and interests of New Jersey. New Jersey withdrew its petition, after being satisfied by GTH's representations to it and the Commission. In withdrawing its petition, however, New Jersey requests that, if the Commission ultimately assigns the station WOR-TV license to GTH, the Commission condition the license on GTH "meeting its commitments to New Jersey as expressed in [GTH's] pleadings and attached letter" to New Jersey.

47. Subsequently, Tatum filed an opposition to New Jersey's withdrawal of its petition. Tatum asserts that, in withdrawing its petition, New Jersey is attempting to "wipe the slate clean" and encourage the Commission to grant the application without considering New Jersey's petition. Tatum contends that "such procedure is not possible under Commission procedures, and therefore the Request to Withdraw must be dismissed as a nullity." Tatum maintains that in such a situation the Commission must consider the merits of the petition, notwithstanding the petitioner's request to withdraw it.

48. A petitioner is always free to withdraw its pleading, but the withdrawal does not necessarily dispose of the issues raised. *See Booth American Co.*, 58 F.C.C.2d 553, 554 (1976). In this case, however, the issues raised in New Jersey's petition were also raised by other petitioners and

have been fully addressed above. They need not be separately discussed. As to New Jersey's request for the imposition of a condition with regard to GTH's performance, we note that the representations made by GTH to New Jersey are almost identical to those set out in the application. It is apparent that GTH understands its service obligations, based on those representations. The imposition of a condition, therefore, serves no purpose and will not be specified.

**Conclusion**

49. We have reviewed the pleadings filed in this case and conclude that the public interest would not be served by calling for the early filing of station WOR-TV's renewal application or by accepting for filing Mainstream's application for a construction permit for a new television station to operate on channel 9, Secaucus, New Jersey. We have also determined that the pleadings raise no substantial and material questions of fact requiring resolution in a hearing. Finally, in view of the above and our review of the assignment application, we find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity.

50. Accordingly, IT IS ORDERED, That the request of Mainstream Television Limited Partnership for the early filing of the renewal application for station WOR-TV IS DENIED.

51. IT IS FURTHER ORDERED, That the application (ARN-860331KQ) of Mainstream Television Limited Partnership for a construction permit for a new commercial television station to operate on channel 9, Secaucus, New Jersey, IS RETURNED as unacceptable for filing.

52. IT IS FURTHER ORDERED, That the request for modification of station WOR-TV's license and the petition to deny the assignment application filed by Mr. Wilbert A. Tatum ARE DISMISSED, and when considered as an informal request for Commission action and an informal objection, ARE DENIED.

53. IT IS FURTHER ORDERED, That the petitions to deny the assignment application filed by Mainstream Television Limited Partnership and Hill Broadcasting of New Jersey, Inc., ARE DENIED and the petition filed by Multi-State Communications, Inc., IS DISMISSED.

54. IT IS FURTHER ORDERED, That the petition to deny the assignment application filed by the State of New Jersey IS DISMISSED at the request of the petitioner and its request for the imposition of a condition on the grant of the assignment application IS DENIED.

55. IT IS FURTHER ORDERED, That the application (BALCT-860604KH) to assign the license of station WOR-TV from RKO General, Inc. to GTH-101, Inc., IS GRANTED.

56. IT IS FURTHER ORDERED, That the Mass Media Bureau shall mail copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**FOOTNOTES**

[1] On August 4, 1986, Tatum filed a new pleading restating the substance of his previous petition, but additionally requesting in the alternative that the assignment application be dismissed or denied. RKO and GTH filed their oppositions to this petition on August 13, 1986, to which Tatum replied on September 4, 1986.

[2] WOR-TV's license specifies an expiration date of March 12, 1988.

[3] The related pleadings are oppositions filed by RKO and Multi-State Communications, Inc., on April 14 and 15, respectively, and a reply filed April 22, 1986, by Mainstream.

[4] Multi-State filed its petition to deny on July 10, while the remaining petitioners filed on July 14, 1986. RKO and GTH filed oppositions to the petitions on July 29, 1986, to which all petitioners except New Jersey replied on August 15, 1986. New Jersey filed its reply on August 22, 1986. For good cause shown, we grant New Jersey's motion for an extension of time to file its reply pleading. On September 24, 1986, Mainstream filed a supplement to its petition to deny, which will be considered, in our discretion, along with GTH's September 26, 1986 opposition to that supplement.

[5] *See RKO General, Inc. (WOR - TV )*, 53 R.R.2d 671 (1983), *aff'd, Multi-State Communications Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 105 S. Ct. 431 (1984); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656 (D.C. Cir. 1984).

[6] *RKO General, Inc. (WOR - TV )*, 46 F.C.C.2d 246 (1974).

[7] *RKO General, Inc. (WOR - TV )*, 69 F.C.C.2d 461 (1978).

[8] *RKO General, Inc. (WNAC - TV )*, 78 F.C.C.2d 1 (1980); *RKO General, Inc. (KHJ - TV )*, 78 F.C.C.2d 355 (1980); *RKO General, Inc. (WOR - TV )*, 78 F.C.C.2d 357 (1980).

[9] *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).

[10] The Commission subsequently designated the KHJ-TV proceeding as the vehicle for determining RKO's basic qualifications to be a licensee. *See RKO General, Inc. (KHJ - TV )*, 94 F.C.C.2d 879 (1983). In *RKO General, Inc.*, FCC 86-383, released September 12, 1986, we set out procedures to facilitate a settlement of the KHJ-TV and related RKO renewal proceedings. We provided, however, that the part of the KHJ-TV proceeding "dealing with resolution of RKO's basic qualifications shall proceed in a manner consistent with our previous orders" to expedite the adjudicatory process in the event that settlements are not reached. *Id.* at paragraph ten.

[11] Pub. L. No. 97-248, 96 Stat. 324 (1982).

[12] *Channel 9 Reallocation (WOR - TV )*, 53 R.R.2d 469 (1983); *RKO General, Inc.*, 53 R.R.2d 671 (1983).

[13] *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 105 S. Ct. 431 (1984).

[14] *RKO General, Inc.*, 54 R.R.2d 853 (1983). The waiver was for a period of 15 months, starting on the date the relocation decision became final. The staff later granted a brief extension of the waiver. By letter dated May 23, 1986, RKO reported that it had started at its new Secaucus studio on May 17, 1986.

[15] 47 C.F.R. §73.1020(a)(17).

[16] *Sara Diaz Warren*, 55 R.R.2d 895 (1984).

[17] 47 C.F.R. §73.3516(c) provides: "An application for a construction permit for a new broadcast station, the facilities for which are specified in an outstanding construction permit or license, will not be accepted for filing."

[18] *Warren v. FCC*, 755 F.2d 781 (D.C. Cir. 1984) (*mem.*). *See also Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963).

[19] *See Channel 9 Reallocation (WOR - TV )*, 53 R.R.2d 469 (1982); *aff d sub nom., Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 105 S. Ct. 431 (1984).

[20] *Multi-State Communications, Inc. v. United States*, 85 Civ. 9593 (S.D.N.Y. filed Dec. 9, 1985).

[21] *See, e. g., Metromedia Radio & TV*, 102 F.C.C.2d 1334, 1338-39 (1985), *reconsideration denied*, 59 R.R.2d 1211 (1986), *appeal docketed sub nom. Health and Medicine Policy Research Group v. FCC*, No. 85-1837 (D.C. Cir. filed Dec. 24, 1985).

[22] *See also RCA Corp. (G. E. Merger )*, 60 R.R.2d 563, 567-68 (1986); *Stoner Broadcasting System, Inc.*, 74 F.C.C.2d 547 (1979).

[23] Mainstream's petition to deny and its request for the early filing of the station WOR-TV renewal application make essentially the same allegations and arguments. They will not, therefore, be separately discussed, except as indicated below.

[24] The issues we specified against RKO are set out in *RKO General, Inc. (KHJ - TV )*, 94 F.C.C.2d 879, 888-89 (1983). The presiding ALJ subsequently specified six more issues in *Orders* released June 18 and October 11, 1984, FCC 84M-2740 and FCC 84M-4351.

[25] As stated in the Conference Report on the bill: "This provision will remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none." H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982).

[26] Section 331 is not limited to New Jersey and would also apply, for example, to a Philadelphia VHF station electing to move to Delaware. In fact, no Philadelphia VHF station has volunteered to make such a move. It is apparent, therefore, that the licensee most likely to take advantage of section 331 is one facing a serious challenge to its authorization, either in a renewal or revocation context. Again, we believe it would be highly unlikely for a licensee to volunteer to relocate to Delaware if its previous conduct could be raised immediately after receipt of a new license.

[27] One possible means of resolving the issues as to RKO's alleged post-grant misconduct would be to review, and rest a determination on, the extensive record in the KHJ-TV proceeding. By doing so, however, we would bypass normal procedures and reach a decision without the benefit of the ALJ's analysis and any of his findings that might be based on witness demeanor. Such a course of action would not be the most effective decision-making process or the best use of our resources. We have limited our review, therefore, to the matters set out in the pleadings now before us. Our action here should not be construed in any way as taking a position as to the resolution of those pending questions.

[28] *Grayson Enterprises, Inc.*, 79 F.C.C.2d 936 (1980), *as modified in Transferability of Licensees*, 53 R.R.2d 126 (1983). *See also Character Qualifications*, 102 F.C.C.2d 1179, 1223-25 (1985),*reconsideration denied*, FCC 86-455, released November 6, 1986.

[29] *Grayson* modified prior Commission policy as to the transferability of licenses. Therefore, cases cited by Mainstream, such as *Jefferson Radio Co. v. FCC*, 340 F.2d 497 (D.C. Cir. 1964), and *WDUL Television Corp.*, 36 F.C.C. 497 (1964), must be viewed in light of the subsequently adopted *Grayson* policy. Mainstream also cites *Calhoun County Broadcasting Co.*, 57 R.R.2d 641 (1985), in support of its position. There, the Commission designated the renewal applications of two stations licensed to a sole proprietor for a hearing on basic qualifications issues. Also pending was an application, filed after the renewal applications and after the qualifications questions arose, to assign one of the two licenses to a new party. In accordance with the *Grayson* procedure, the Commission expressly stated that it would defer consideration of the assignment application until after it resolved the qualifications issue. Thus, *Calhoun* involved a decision to designate a renewal application for hearing, the violations were allegedly attributable to the person directly responsible for the control and operation of the station, and an affirmative decision was made that the license would not be transferable. None of these three elements is present with regard to the WOR-TV license and the *C alhoun* decision does not govern here.

[30] In this regard, transfer of control and assignment applications differ from renewal applications, for example, where the sole applicant seeks a continuing authorization to operate the station.

[31] The Commission adopted the modified *KHJ-TV Order* on June 3, 1983, pursuant to the court's directions on remand. All remaining RKO renewal applications were designated for comparative hearing in *Orders* adopted on November 8, 1984, FCC 84-534 and 538-44, after the ALJ released his last *Order* on October 11, 1984, enlarging issues as to RKO conduct. Thus, all of the issues referred to by Mainstream were before us when the last designation *Orders* were adopted.

[32] *Grayson* applies to cases involving transfer or assignment of licenses. Our review of such applications normally focuses on the prospective service to be provided by a qualified buyer, rather than the seller that will no longer operate the station.

[33] We understand that the question as to whether RKO was in fact deterred from wrongdoing after the loss of the WNAC-TV license and the filing of competing applications is, in part, the subject of the issues in the KHJ-TV proceeding. We do not here prejudge the disposition of those issues.

[34] Mainstream contends that the shortcomings described in *Grayson* are unlikely to occur in this case. As is clear from the language quoted from *Grayson* in paragraph 25, that case expresses a policy judgment that there is a strong potential for injury to the public interest that must be considered, where a licensee is compelled to continue operation of a station long after it decides to sell. Those concerns are predictive in nature and not subject to specific factual support in advance. Our judgment in this area, however, clearly has support. As but one example, higher than normal employee turnover when stations are up for sale is a recognized phenomenon in the broadcast industry. See, for example, the concerns expressed by one experienced broadcaster in *L.P. Media, Inc.*, 102 F.C.C.2d 1276, 1286-87 (1985).

[35] The rule in question, section 73.1205, was deleted in *Unnecessary Broadcast Regulation (Business Practices)*, 59 R.R.2d 1500 (1986). The Commission stated there that hearings already in progress relating to violations of Section 73.1205 would proceed, but that otherwise such matters would no longer be investigated by the Commission in the first instance. Id. at 1510. *See also, Character Qualifications*, 102 F.C.C.2d 1179, 1204 and n.59 (1986).

[36] We believe that this concern is particularly relevant here, when we consider the need for stability and service by the only station licensed to serve a previously unmet need -- commercial VHF service to New Jersey -- as determined by Congress in section 331 of the Act.

[37] Mainstream observes that in *RKO General, Inc. (WHBQ-TV)*, 82 F.C.C. 2d 291, 297-305 (1980), *remanded on other grounds sub nom. New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), we concluded that the public interest would not be served, based on the record available at that time,

by permitting the spin-off to a new entity, owned by RKO shareholders, of the RKO licenses then in hearing. Mainstream reasons that the rationale supporting that result should similarly prohibit the assignment of the station WOR-TV license. It should be recalled, however, that at the time the Commission adopted the WHBQ-TV decision, it had just recently denied renewal of the WNAC-TV license and determined that the WOR-TV and KHJ-TV license renewal applications should also be denied. (As noted in the background recited above in paragraphs two through five, the court later remanded for further consideration our decisions with regard to the WOR-TV and KHJ-TV renewal applications.) The remaining RKO licenses that were the subject of the WHBQ-TV decision had all been granted subject to the outcome of the WNAC-TV/Boston proceeding. The conditions had been imposed "in order to preserve our ability to revisit those renewals should our findings and conclusions in the Boston proceeding so warrant." 62 F.C.C.2d at 301. On the basis of the record then existing, the Commission concluded that it could not determine without a hearing whether RKO was qualified as a renewal applicant. As a result of the adoption of section 331, however, RKO received an unconditional, five-year license for station WOR-TV in 1983. The concerns expressed as to RKO's overall qualifications in WHBQ-TV, therefore, are not applicable to the valid station WOR-TV license. The case now before us arises in an assignment, not a renewal, context. In our view, the public interest is better served by applying policies relating to assignment applications, specifically including Gr ayson, than by following the course set out in WHBQ-TV, which arose in a renewal context.

[38] Section 73.3516(c) of the Commission's Rules is quoted above in footnote 17. The rule generally states that the Commission will not accept for filing an application for a construction permit for a new station proposing to use facilities specified in an outstanding license or construction permit. We believe, for the reasons set out in this paragraph, that Mainstream's request for waiver of that rule in this case would be inconsistent with the grant of a five-year license to RKO, an action that has long been final. Mainstream's waiver request is, therefore, denied. Mainstream may file an application when the WOR-TV license expires.

[39] S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982).

[40] 128 Cong. Rec. S10946 (daily ed. Aug. 3, 1982).

[41] *Channel 9 Reallocation (WOR-TV),* 53 R.R.2d 469, 471 (1983).

[42] In other contexts, the Commission has imposed high burdens of pleading as to matters involving programming judgments. *See, e.g., American Security Council Education Foundation v. FCC,* 607 F.2d 438, 445-47 (D.C. Cir. 1979) (high burden of pleading Fairness Doctrine complaints approved), and *Mrs. J.R. Paul, 26 F.C.C.2d 591 (1969) (high burden of pleading for complaints as to deliberate distortion of news).*

[43] *RKO General, Inc.,* 54 R.R.2d 853 (1983).

[44] Although apparently resting on a quantitative analysis, the petitioners assert that WOR-TV's news continues to place a primary emphasis on New York City news. To support that allegation, the petitioner's study refers to one program broadcast on April 16, 1986. Since 1983, however, station WOR-TV has broadcast more than 650 of the hour-long "News at Noon" programs, a somewhat smaller number of the half-hour "News 9 Primetime" programs, plus weekend news programs. The study reviewed 50 of the "News at Noon" and 42 of the "News 9 Primetime" programs. Given the large number of programs broadcast and the 92 programs reviewed in the study, an analysis of one program provides very small support for the burden of pleading placed on petitioners, as described at the beginning of this section.

[45] Petitioners Hill and Mainstream rely on a study of WOR-TV's programming to contest RKO's performance in carrying out its representations to serve Secaucus and New Jersey. RKO attacks the study as biased and questions its methodology. The author of the study only defended these charges specifically with respect to programming sampled in 1986. Thus, we do not know the basis for the selection of the various days on which information was gathered for the study in prior periods of time. We do not know, therefore, whether the days selected represent RKO's best, worst or typical performance. Of greatest concern is the fact that the fewest number of days studied fell in the period when RKO performed at its best, in 1984, according to the study. Moreover, the measured 1984 performance was followed by a 24-month hiatus in sampling. Without some explanation, we have no reason to know why the specific days were selected for study. Further, the petitioners take the position that the station's performance varied over the years. Given that premise, it would be inaccurate to extrapolate the figures gathered in 1986 to reflect the station's entire performance since 1983. We therefore accept the study as providing general information as to RKO's service to New Jersey, but not as a statistically valid sampling of its service over the years. Similarly, RKO has submitted extensive exhibits concerning its service, but does not claim its submissions are a statistical sample. We rely on these sources to the extent that they demonstrate the broadcast of issue-responsive programming, not to make a quantitative judgment. It is the former, not the latter, that is the focus of our concern.

[46] RKO notes that it continues to interview community leaders in northern New Jersey to ascertain community problems. It notes that 258 out of 313 (more than 82 percent) community leaders interviewed since January, 1984, represented organizations or agencies within station WOR-TV's northern New Jersey service area. It concludes: "The specific public affairs program broadcast by WOR-TV have treated the issues identified in these ascertainment surveys."

[47] The petitioners have raised several other criticisms of station WOR-TV's performance as a New Jersey outlet, but many of these criticisms go to matters of licensee editorial discretion, and are not directly relevant to whether section 331 has been complied with. For example, petitioners' disagreement with the sequence of news stories is not a matter within our review. In addition, the practice of delaying programs pending the completion of a sports event is similarly outside the scope of this review and falls well within the licensee's discretion. Finally, printed promotional material apparently used by Eastern Microwave, Inc. in distributing WOR-TV to cable television systems does not appear to be within RKO's control and is not the focus of section 331.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-3

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|---|---|
| Amendment of Section 73.606(b), | RM-4846 |
| Table of Assignments, | |
| TV Broadcast Stations. | |
| (Holbrook, Arizona) | |

## REPORT AND ORDER

(Proceeding Terminated)

Adopted: November 3, 1986 Released: December 8, 1986

By the Acting Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 50 Fed. Reg. 5402, published February 8, 1985, issued in response to a petition filed by Metro Telecasting ("petitioner"), proposing the assignment of VHF Television Channel 6 to Holbrook, Arizona, as that community's first commercial television service. Additionally, the related offset change on Channel 6 from "minus" to "plus" at Kingman, Arizona, [1] was proposed to accommodate the proposal. Supporting comments were filed by petitioner reaffirming its intent to apply for the channel, if assigned. Reply comments were filed by the National Federation of Community Broadcasters [2] ("NFCB").

2. Holbrook (population 5,785), [3] the seat of Navajo County (population 67,629), is located in eastern Arizona, approximately 230 kilometers (140 miles) northeast of Phoenix. Currently, Holbrook has no commercial service and one vacant noncommercial educational television assignment.

3. As indicated in the *Notice*, VHF Television Channel 6 at Holbrook would require a site restriction 15.7 miles north of the community to avoid short-spacing to Station KUAT-TV (Channel 6), Tucson, Arizona, as well as a change in the carrier offset on Channel 6 at Kingman, Arizona.

4. In response to the *Notice*, NFCB acting on behalf of noncommercial educational FM Stations KSHI (Channel 215), Zuni, New Mexico, and KNNB (Channel 201), Whiteriver, Arizona, both of which are owned by Native American Tribes, advised that those stations would be severely limited in their future expansion efforts if Channel 6 is assigned to Holbrook in view of the new rules relating to noncommercial educational stations that have been adopted in Docket No. 20735, 50 Fed. Reg. 27954, published July 9, 1985.

5. NFCB adds that the proposed site of Channel 6 would place it in the center of four major Indian reservations whose groups are currently planning noncommercial educational stations in the area. It adds that in order to provide an adequate signal to its target audience, reservation based stations must operate with full facilities. This, it claims could not be accomplished if the proposal herein is adopted. Thus, NFCB requests that since ample spectrum space is available in the area, another channel be assigned to Holbrook for commercial purposes.

6. In order to resolve the conflict, a staff engineering study reveals that VHF Television Channel 11 can be assigned to Holbrook consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules, and without the necessity of an offset change elsewhere. Moreover, we believe in this instance, that Channel 11 may be preferable to Channel 6 at Holbrook since it could provide a first local commercial VHF television service without placing stringent limitations on noncommercial FM stations in the area.

7. Since Holbrook is located within 400 kilometers (250 miles) of the U.S.-Mexico border, concurrence in the proposal was obtained from the Mexican Government.

8. In view of the above, and having found no policy objection to the proposal, we believe the public interest would be served by assigning Channel 11 to Holbrook, Arizona, since it could provide a first local commercial television service to that community.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22, 1987, the Television Table of Assignments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

| City | Channel No. |
|---|---|
| Holbrook, Arizona | 11+, *18+ |

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information regarding the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

### FOOTNOTES

[1] A construction permit was granted for Channel 6 at Kingman, Arizona, to Grand Canyon Television Co., Inc. conditioned on the outcome of this proceeding.

[2] Although NFCB's reply comments advanced new issues, we have accepted the reply in order to permit consideration of a potential technical problem. Petitioner was provided an opportunity to respond to the Channel 6 issue, but failed to do so. In view of our action herein assigning a VHF channel to Holbrook, we believe that no prejudice will result from the acceptance of NFCB's response.

[3] Population figures were extracted from the 1980 U.S. Census.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-292**

| | |
|---|---|
| Amendment of Section 73.202(b) | RM-5328 |
| Table of Allotments. | |
| FM Broadcast Stations. | |
| (Doniphan, Missouri) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 7, 1986 Released: December 9, 1986**

By the Acting Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 51 FR 25583, July 15, 1986, issued in response to a request filed by Jack G. Hunt, licensee of Station KOEA(FM), Channel 249A, Doniphan, Missouri, proposing the substitution of FM Channel 248C2 for Channel 249A and modification of the license accordingly. Petitioner filed supporting comments in which he reaffirmed his interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 248C2 for Channel 249A at Doniphan, Missouri, since it could provide the community with its first wide area coverage FM service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules, at the current location of Station KOEA(FM).

3. We have authorized in paragraph 4 a modification of petitioner's license for Station KOEA(FM), Doniphan, Missouri, to specify operation on Channel 248C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Section 4(i), 5 (c) (1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective January 22 , 1987, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Doniphan, Missouri | 248C2 |

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KOEA(FM), Doniphan, Missouri, IS MODIFIED TO SPECIFY operation on Channel 248C2 in lieu of Channel 249A in accordance with Section 1.420(g) of the Commission's Rules and subject to the following conditions:

(a) The licensee shall file with this Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

RCA GLOBAL
COMMUNICATIONS, INC.

Complainant,

v. File No. E-86-8

WESTERN UNION INTERNATIONAL, INC.

Defendant.

**ORDER**

**Adopted December 4, 1986 ; Released December 9, 1986**

By the Common Carrier Bureau:

1. On November 7, 1985, RCA Global Communications, Inc. (RCA Globcom) filed a formal complaint with the Commission against Western Union International, Inc. (WUI) pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208, alleging that the defendant had denied plaintiff access to certain intercarrier interconnection numbers. On November 24, 1986, counsel for the parties submitted a joint letter representing that they have reached a mutually acceptable settlement resolving the issues in dispute. Therefore, withdrawal of the complaint was requested.

2. On the basis of the statements contained in the letter, we conclude that no controversy now exists and that the proceeding should be terminated. Accordingly, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, RCA Globcom's request to withdraw its complaint IS GRANTED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| HORIZON COMMUNITY BROADCASTERS, LTD., Katy, Texas | MM Docket No. 84-1031 File No. BPCT-840710KG |
| VICTORY MEDIA, INC., Katy, Texas | MM Docket No. 84-1033 File No. BPCT-840711KF |
| JOHNSON BROADCASTING, INC., Katy, Texas | MM Docket No. 84-1034 File No. BPCT-840711KI |
| LOUISE BRUNSON Katy, Texas | MM Docket No. 84-1035 File No. BPCT-840711KO |

For Construction Permit

**ORDER**

**Adopted: December 3, 1986; Released: December 10, 1986**

By the Review Board:

1. On November 17, 1986, Johnson Broadcasting, Inc. and Horizon Community Broadcasters, Ltd. filed a joint request for approval of settlement agreement. The Review Board will grant the joint request which complies with all of the legal requirements.

2. Horizon has agreed to the dismissal of its application in return for the payment of $55,350.00 by Johnson Broadcasting. These applicants have shown as required by the Communications Act, 47 USC 311(c)(3), and the Commission's rules, 47 CFR 73.3525, that dismissal of Horizon's application will reduce the scope of this four party comparative case and thereby serve the public interest. They have also certified that their applications were not filed for the purpose of reaching or carrying out a settlement agreement.

3. ACCORDINGLY, IT IS ORDERED, That the joint request for approval of settlement agreement filed November 17, 1986, IS GRANTED and that the application of Horizon Community Broadcasters, Ltd. (BPCT-840710KG) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM DOCKET NO. 86-461**

In re Applications of

Roland Bushland d/b/a
BUSHLAND RADIO SPECIALTIES/WCFW — File No. BPCT-860702KJ

FAMILY GROUP
LTD., III — File No. BPCT-860820KI

For Construction Permit
Chippewa Falls, Wisconsin

**HEARING DESIGNATION ORDER**

**Adopted: November 25, 1986 Released: December 10, 1986**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Roland Bushland d/b/a Bushland Radio Specialties/WCFW (Bushland), and Family Group Ltd., III (Family) for authority to construct a new commercial television station on Channel 48, Chippewa Falls, Wisconsin.

2. Roland Bushland, 100% owner of the proposed television station, also owns 100% of radio station WCFW(FM) in Chippewa Falls, Wisconsin. His wife, Patricia Bushland, is the general manager of WCFW(FM). There is a rebuttable presumption that the media interest of spouses are attributable to each other. Section 73.3555(b)(2) of the Commission's Rules proscribes common ownership, operation or control of a television station and an FM station if the principal community of the FM station would be within the predicted Grade A contour of the television station. Note 4 to the rule, however, provides for a case-by-case determination as to whether such common ownership, operation or control would be in the public interest in the case of a UHF television station. Accordingly, an appropriate issue will be specified.

3. Family indicates that the applicant is a limited partnership. The general partners have been identified, but no reference has been made to the limited partners. Section 73.3514(a) of the Commission's Rules requires an applicant to provide all information called for by FCC forms, unless the information is inapplicable. However, in *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), the Commission stated that henceforth limited partnership interests were not attributable for the purposes of the multiple ownership rules if the applicant certifies that the limited partners will "not be involved in any material respect in the management or operation of" the proposed station, 97 FCC 2d at 1023. The Commission defined the degree of noninvolvement in paragraphs 48-50 of the decision on reconsideration. Further, the Commission directed that Form 301, among others, be amended to conform to the new attribution standards, 97 FCC 2d at 1034. Although changes in the form have not yet been made, there is now no need to provide information as to the limited partners if Family can submit the necessary certification and showing that limited partnership interests have been or will be sold only to individuals or entities that are sufficiently insulated. If the certification or showing is not appropriate, of course, the necessary information as to them would have to be filed as an amendment. Further, the Commission retained the cross-interest policy as to other attributable media interests in the same area. *Id.* at 1030. Accordingly, Family, upon determining the limited partners, will be required either to state that the limited partners have or will have no other media interests subject to the cross-interest policy or identify the limited partners with such interests, identify the other local media and state the nature and extent of the ownership interest.

4. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

5. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Bushland has not submitted such a certification. Accordingly, Bushland will be given 20 days from the date of release of this Order to file such a certification, in the form required by the Commission, with the presiding Administrative Law Judge. If the applicant cannot make the certification, he shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

6. Family's proposed site is to be located 3.01 km from the directional array of AM station WEAQ, Eau Claire, Wisconsin. Because of the proximity of the proposed tower to WEAQ, grant of a construction permit to Family will be conditioned to ensure that WEAQ's radiation pattern is not adversely affected by the construction of the proposed station.

7. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to

be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the interests of Roland Bushland and Patricia Bushland in the proposed television station and in radio station WCFW(FM) Chippewa Falls, Wisconsin, would be consistent with Section 73.3555 of the Commission's Rules and, if not, whether the common ownership, operation or control of the facilities would be in the public interest.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

9. IT IS FURTHER ORDERED, That Family Group Ltd., III shall submit the certification, statement and/or information required by paragraph 3, *supra*, to the presiding Administrative Law Judge, within 20 days after this Order is released.

10. IT IS FURTHER ORDERED, That Roland Bushland d/b/a Bushland Radio Specialties/WCFW shall, within 20 days after the release of this Order, file with the presiding Administrative Law Judge, a site availability certification, in the form required by the Commission, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

11. IT IS FURTHER ORDERED, That in the event of a grant of the application of Family Group Ltd., III, it will be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM Station WEAQ so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the result submitted to the Commission.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 86-460

In re Applications of

Christ Center of
Central Florida, Inc. File No. BPET-860616KL
d/b/a THE KINGS ACADEMY

CENTRAL FLORIDA
EDUCATIONAL
TELEVISION, INC. File No. BPET-860820KH

For Construction Permit
Leesburg, Florida

## HEARING DESIGNATION ORDER

**Adopted: November 25, 1986 Released: December 10, 1986**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for authority to construct a new non-commercial educational television station on Channel 45, Leesburg, Florida.

2. No determination has been reached that the tower height and location proposed by Central Florida would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

3. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the area and population which would be within each predicted 64 dBu (Grade B) contour, together with availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Central Florida Educational Television, Inc., whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine the extent to which each applicant's proposed operation will be integrated into the overall cultural and educational objectives of the respective applicants;

3. To determine the manner in which each applicant's proposed operation meets the needs of the community to be served;

4. To determine whether the factors in the record demonstrate that one applicant will provide a superior non-commercial educational broadcast service.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM DOCKET NO. 86-459**

In re Applications of

Melvin Jones d/b/a
JONECO
BROADCASTING File No. BPCT-860623KH

ROBERT
GONZALEZ File No. BPCT-860819KQ

KATHY L.
YOUNG File No. BPCT-860820KG

For Construction Permit
Rio Grande City, Texas

**HEARING DESIGNATION ORDER**

**Adopted: November 25, 1986 Released: December 10, 1986**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned applications for a new commercial television station to operate on Channel 40, Rio Grande City, Texas.

2. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. No determination has been reached that the tower height and location proposed by each applicant would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. Robert Gonzalez proposes to use a directional antenna. Although the contour map and the data furnished in Section V-C, item 15, FCC Form 301, appear to be accurate with respect to the main lobe, the contours have been incorrectly calculated in the directions of reduced power. It seems that the relative field pattern was treated as a relative power pattern. For example, at 0 degrees True, the indicated relative field of 0.2 should result in an effective radiated visual power (ERP) 14.0 dB below maximum or 23 dBk (200 kW). Gonzalez's contour calculations, however, seem to be based on an ERP 7 dB below maximum, or 30 dBk (1,000 kW). Gonzalez will be required, therefore, to submit a corrective amendment to the presiding Administrative Law Judge, within 20 days after this Order is released. The amendment must contain a tabulation of relative field pattern oriented so that 0 degrees corresponds to True North and tabulated at least every 10 degrees plus any minima or maxima. The amendment must also include a new contour map and new calculations for the distances in Section V-C, item 15. Finally, the area and population figures required by Section V-C, item 10(e), FCC Form 301, should be adjusted on the basis of the new calculations.

5. Robert Gonzalez's application does not include page 19 of FCC Form 301. Consequently, we do not have Mr. Gonzalez's responses to Section VI (Equal Employment Opportunity Program) and Section VII (Certification). Accordingly, Mr. Gonzelez will be required to submit, as an amendment, a completed page 19 of FCC Form 301, to the presiding Administrative Law Judge, within 20 days after this Order is released.

6. Joneco Broadcasting submitted an unexecuted copy of its site availability certification. Accordingly, Joneco Broadcasting will be required to submit an executed certification bearing an original signature, to the presiding Administrative Law Judge, within 20 days after this Order is released.

7. With respect to Joneco Broadcasting and Kathy Young, the contours shown in Section V-C, item 15, of their respective applications are incorrectly calculated. Consequently, the distances shown in item 15 cannot be reconciled with the distances shown on the contour maps submitted by each applicant. Furthermore, in each case, the contour map is inconsistent with the distances listed in item 15. Accordingly, each of the applicants will be required to submit an amendment which corrects the distances in item 15 and includes an accurate contour map, to the presiding Administrative Law Judge, within 20 days after this Order is released.

8. Kathy Young submitted a facsimile application, including facsimile site availability certification. Since Section 73.3513(a) and (c) requires the filing of an original, signed application, Ms. Young will be required to file with the presiding Administrative Law Judge, within 20 days of the date of release of this Order, an original application (including an original site availability certification) bearing original signatures.

9. Kathy Young proposes to mount her antenna on the existing tower of Station KCTM(FM), Rio Grande City, Texas, but the coordinates specified by Ms. Young do not agree with those on file with the Commission for the KTCM tower. Accordingly, Ms. Young will be required to file an amendment with the Administrative Law Judge, within 20 days after the release of this Order, giving the correct coordinates for the tower or establishing that the coordinates now specified are accurate.

10. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to

be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

13. IT IS FURTHER ORDERED, That Robert Gonzalez shall submit corrective amendment which contains the information required by paragraph 4, above, to the presiding Administrative Law Judge, within 20 days after this Order is released.

14. IT IS FURTHER ORDERED, That Robert Gonzalez shall submit, as an amendment, a completed page 19, FCC Form 301, to the presiding Administrative Law Judge, within 20 days after this Order is released.

15. IT IS FURTHER ORDERED, That Joneco Broadcasting shall submit an executed site availability certification bearing an original signature, to the presiding Administrative Law Judge, within 20 days after this Order is released.

16. IT IS FURTHER ORDERED, That Joneco Broadcasting and Kathy Young shall each submit an amendment which provides the information and documents required by Paragraph 7, above, to the presiding Administrative Law Judge, within 20 days after this Order

17. IT IS FURTHER ORDERED, That Kathy Young shall submit the original copies of her FCC Form 301 and site availability certification, to the presiding Administrative Law Judge, within 20 days after this Order is released.

18. IT IS FURTHER ORDERED, That Kathy Young shall submit an amendment which specifies the correct coordinates for her proposed transmitter site, to the presiding Administrative Law Judge, within 20 days after this Order is released.

19. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM DOCKET NO. 86-458**

In re Applications of

Melvin Jones d/b/a JONECO BROADCASTING — File No. BPCT-860623KE

TOWER BROADCASTING CORPORATION — File No. BPCT-860820KK

For Construction Permit
Sonora, Texas

**HEARING DESIGNATION ORDER**

**Adopted: November 25, 1986 Released: December 11, 1986**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 11, Sonora, Texas.

2. Joneco Broadcasting (Jones) proposes to mount its antenna on the existing tower of Station KIXY-FM, San Angelo, Texas, licensed to Foster Communications (Foster). Jones lists the transmitter site coordinates in Sections V-G and V-C, FCC Form 301, as 30 degrees 33' 36" North Latitude, 100 degrees 37' 54" West Longitude, but the Commission's records indicate that KIXY-FM's transmitter site coordinates are 31 degrees 29' 14" North Latitude, 100 degrees 26' 57" West Longitude. Moreover, KIXY-FM's transmitter is located in San Angelo, Texas, not in Sonora, as specified by Jones in Section V-C, Item 8. San Angelo is more than 60 miles from Sonora. In its response to Section V-G, Item 1, Jones gives the address as 115 W First Street, Sonora, Texas, but in its response to Section V-C, Item 8, the street address is given as 206 W-5th Hall Road, Sonora, Texas. The data given in the application for the transmitter location is conflicting and confusing and the Commission is, therefore, unable to determine where Jones proposes to locate his antenna and transmitter. Accordingly, Jones will be required to submit an appropriate amendment clarifying the location of Jones' proposed transmitter site. Further, on August 19, 1986, a letter of objection was filed by Lynn Smith, Chief Engineer for Foster, advising the Commission that Foster had given no assurance to Jones that the specified tower or any other tower owned or leased by Foster would be available to Jones. Accordingly, an issue will be specified to determine whether Jones has reasonable assurance that the site will be available, and if not, whether it has made misrepresentations to the Commission.

3. Section VII, FCC Form 301 requires an original signature of the applicant, certifying that the information in the application is true, complete and correct. Jones has submitted a facsimile signature. Jones will be required to submit a copy of Section VII, FCC Form 301 bearing an original signature, to the presiding Administrative Law Judge within 20 days after this Order is released.

4. Jones has submitted contour distances in Section V-C, Item 15 (tabulation of terrain data) that are inaccurate. In addition, the contour maps show contours that neither reflect the given data nor the correct data. If Jones wishes to continue to specify the facilities now set out in his application, it will be required to amend its application to include corrected data in Section V-C, Item 15 (tabulation of terrain data), new contour maps and corrected area and population figures.

5. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. No determination has been reached that the tower height and location proposed by Tower would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

7. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to the application of Joneco Broadcasting:

(a) whether the applicant has reasonable assurance that his specified site will be available to him;

(b) whether, in light of the evidence adduced pursuant to the foregoing issues, the applicant misrepresented to the Commission the availability of his specified site; and if so, the effect thereof on the applicant's basic qualifications.

2. To determine, with respect to the application of Tower Broadcasting Corporation, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

9. IT IS FURTHER ORDERED, That Joneco Broadcasting shall submit an amendment clarifying the location of its proposed transmitter site.

10. IT IS FURTHER ORDERED, That Joneco Broadcasting shall submit a copy of Section VII, FCC Form 301 bearing an original signature to the presiding Administrative Law Judge within 20 days after the release of this Order.

11. IT IS FURTHER ORDERED, That, in the event Joneco Broadcasting elects to prosecute his application as presently constituted, it shall submit an amendment with respect to contour distances as set out in paragraph 4, *supra*, to the presiding Administrative Law Judge, within 20 days after the release of this Order.

12. IT IS FURTHER ORDERED, That Foster Communications IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

14. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

US TELECOM, INC. File No. ENF-86-13

Equal Access Complaint

**MEMORANDUM OPINION AND ORDER**

**Adopted December 4, 1986 ; Released December 10, 1986**

By the Chief, Common Carrier Bureau:

## I. BACKGROUND

1. On May 16, 1986, US Telecom, Inc. (US Telecom)[1] filed a complaint with the Bureau's Equal Access Task Force (Task Force) concerning the equal access conversion process[2] as it is currently administered by the seven Regional Bell Operating Companies (RBOCs) and their local operating companies (BOCs). In its complaint, US Telecom contends that the presubscription[3] aspects of the conversion process are marred by what it characterizes as a number of "pervasive" or "endemic" dysfunctional problems which subject it and other nondominant IXCs to undue prejudice and disadvantage vis-a-vis AT&T, in violation of Section 202(a) of the Communications Act.[4] These problems, US Telecom claims, have produced losses in revenues as well as the more permanent effects of a loss in credibility in the eyes of the consumer at a time when those factors are most critical to fully competing with AT&T, which is unaffected by the "flawed" conversion processes.[5] The specific problems alleged by US Telecom, (a) misassignments of customer lines, (b) inconsistent procedures and disparate systems for processing customer tapes, and (c) lack of uniformity in BOC ordering procedures, all stem from what it characterizes as a lack of adequate uniform and standardized procedures among the RBOCs to govern the interactions between IXCs and LECs necessary to process consumer selections of long distance carriers. US Telecom argues that this lack of uniformity handicaps the IXCs not only in trying to correct or prevent errors, but also in scheduling, verifying and implementing equal access in general. It asserts that the problems will have an especially detrimental effect on the substantial number of equal access conversions that are not scheduled to take place until after the *MFJ* -imposed deadline of September 1, 1986.[6] US Telecom claims that the absence of inter-RBOC uniformity will overwhelm the post-1986 selection process. To remedy what it characterizes as pervasive problems, US Telecom urges the Commission to require the RBOCs to standardize, to the maximum degree possible, their internal and external systems and procedures for handling equal access conversions.

2. US Telecom's complaint raises a number of issues about the equal access conversion process previously considered by the Commission in formal proceedings. In accord with our ongoing interest in the quality and progress of the equal access implementation process,[7] however, we deemed it appropriate to invite public comments on US Telecom's standardization proposal.[8] In response to our notice, we received comments from nine parties,[9] and US Telecom filed a reply to those comments.

## II. US TELECOM's STANDARDIZATION PROPOSAL

3. US Telecom maintains that the most prevalent problem in the equal access conversion process is the widespread data transmission errors that have resulted in the misassignment of customer lines to IXCs other than the one chosen by the customer.[10] According to US Telecom, misassignment of lines occurs in the process of reprogramming the switch most often as a result of a BOC error in translating Primary Interexchange Carrier (PIC) information from its Customer Record Information System (CRIS)[11] into the end office switch. US Telecom claims that the problem is that most RBOCs do not have adequate procedures to detect and resolve discrepancies between the CRIS and the switch data bases.[12] What is needed, US Telecom contends, is a reliable, efficient way of comparing the CRIS record to the switch record in order to detect translation errors in the switch as part of standard operating procedure for each company rather than waiting to correct errors after they have occurred. US Telecom proposes that RBOCs be required to implement a standardized database system "accessible by both interexchange and exchange carriers whereby the PIC information contained in the CRIS can be compared to the PIC translation programmed into the end office switch." In US Telecom's view, such a system will enable IXCs and LECs to work together efficiently in order to minimize the number of such problems occurring in the future and to detect more quickly and resolve those that do occur.

4. A substantial portion of US Telecom's complaint details problems it has allegedly experienced with the production and exchange of information tapes with the LECs during the conversion process. According to US Telecom, wide variations among RBOCs in terms of their individual deadline and compliance requirements have produced significant difficulties in terms of lost, mishandled or defective customer tapes. As a result of these problems, US Telecom contends, many of its customers have missed their scheduled conversion dates, while it has correspondingly lost revenue and allocation potential and incurred unwarranted administrative expenses.[13] US Telecom asserts that another aspect of this problem is the relative inflexibility of the RBOCs towards its particular needs and problems. US Telecom proposes that the RBOCs be required to establish a uniform set of schedules and procedures with which to standardize the conversion process.

5. Finally, US Telecom complains about the customer order information it receives from the BOCs. According to US Telecom, a major factor in the IXCs' successful participation in equal access conversions is their ability to obtain certain basic and critically important information about subscribers in the converting end office.[14] US Telecom claims that due to the lack of inter-RBOC standardization, this critical information is provided to IXCs at different times and in different formats, and that BOCs often change their formats on short notice. US Telecom argues that it must pay for this information and must also pay computer-related costs associated with reconstructing

its systems to interact properly with such format changes. As a result, US Telecom claims, it has been late in processing PIC orders from the BOCs, at times by as much as 60 days, and has had to hire additional staff to program changes. Moreover, US Telecom argues, the problem of inconsistency goes beyond formatting and information content because RBOCs currently use a variety of different systems to exchange information. US Telecom claims that at least one RBOC has refused to implement the Customer Access Record Exchange (CARE) format developed by industry forums,[15] while other RBOCs have implemented piecemeal or substantially differing CARE systems. US Telecom suggests that all RBOCs should be required to implement uniform CARE systems for the exchange of records between LECs and IXCs.

## III. SUMMARY OF COMMENTS

6. US Telecom's standardization proposal is supported by Western Union Telegraph Company (Western Union) and United States Transmission Systems, Inc. (USTS), the only IXCs to file comments in response to our public notice. While neither Western Union nor USTS supplied factual documentation as to particular problems they encountered in the conversion process, both generally allege to have experienced problems substantially similar to those identified by US Telecom in its complaint. USTS estimates that it has incurred added costs of $100,000 to $200,000 which are directly attributable to the necessity of dealing with a multiplicity of disparate BOC systems and procedures.

7. The commenting BOCs and RBOCs (hereafter collectively referred to as "the opponents") universally oppose US Telecom's standardization proposal. The opponents generally assert that US Telecom has failed to identify the existence of "pervasive" problems in the conversion process that would warrant the strict regulatory control over and national standardization of RBOC internal and external systems as proposed. They contend that variations in RBOC processes are the direct result of the Commission's specific determination that the BOCs were to be permitted some flexibility in implementing customer ballot and allocation. The opponents argue that most of the alleged problems identified by US Telecom are caused not by the lack of standardization, but rather by the failure of some BOCs and, in some cases, IXCs to utilize existing procedures properly. The opponents point out that the Commission has twice rejected similar requests for broad rulemaking actions to "improve" the equal access implementation process, finding that problems with the presubscription process appeared to be diminishing with time and that the process, on the whole, was being implemented successfully.[16] They argue that US Telecom has failed to demonstrate that existing Commission policies and procedures as set forth in prior Commission decisions are inadequate to address the conversion problems alleged in its complaint. In the opponents' view, most problems encountered in the process can be resolved through direct negotiations between IXCs and LECs or addressed through one of the existing industry forums. The opponents further assert that the Commission's complaint procedures are available to examine any allegations of specific BOC misconduct.

8. Finally, various arguments are made that (1) many of the specific equal access conversion problems alleged by US Telecom are largely unsubstantiated or significantly overstated; (2) adequate controls are already in place to minimize and correct misrouting problems; (3) IXC access to standardized BOC databases would improperly give IXCs access to customer proprietary records as well as information about competing IXCs; (4) US Telecom has not shown that standardized procedures will solve the problems it has allegedly encountered in the conversion process; and (5) given the substantial progress the BOCs have made in implementing equal access, it would be counterproductive to require sweeping, costly changes that would require substantial time and effort and substantially delay or disrupt the evolution of equal access.

## IV. DISCUSSION

9. We have carefully considered the evidence and arguments presented by US Telecom and all of the commenters. For the reasons set forth below, we are not persuaded that further Commission action, as requested by US Telecom, is warranted at this time.

10. As indicated above, US Telecom's standardization proposal raises a number of issues concerning the equal access implementation process previously addressed at great length by the Commission. In the *Allocation Order*, the Commission adopted a customer allocation plan specifically designed to allow some implementation flexibility for the various independent participating carriers.[17] In modifying the *Allocation Order*, the Commission declined to adopt a proposal by certain IXCs to require greater standardization of LEC allocation reporting procedures finding that, on the whole, LECs had made substantial progress in resolving reporting deficiencies.[18] In December 1985, after a thorough discussion of its "policies concerning competition in the interexchange marketplace and transition to equal access," the Commission denied the request of US Telecom and three other IXCs to institute a broad rulemaking proceeding to establish new policies for the transition to equal access.[19] The Commission concluded that its policies were "fundamentally sound and should not be modified in any substantial manner."[20] In October 1985, the same concerns expressed by U.S. Telecom in the instant complaint (data translation errors, problems with BOC administrative processes and a lack of uniform ordering procedures) were raised in a petition for rulemaking filed by TDX Systems, Inc. (TDX) and supported by other IXCs, including US Telecom. Rejecting various arguments that widespread problems in the presubscription aspects of the implementation process effectively prevented IXCs from obtaining access equal to that enjoyed by AT&T, the Commission declined to institute the broad rulemaking proposed by the parties to improve the implementation process, stating:

> The presubscription process has been the subject of intense scrutiny from both the DOJ and this Commission. We are satisfied that whatever problems remain are the result of the BOCs' failure to implement the rules that have already been created, rather than the result of inadequate rules. We believe that complaints regarding the BOCs' practices are transitional problems of enforcement to which this Commission's Enforcement Division and Equal Access Task Force can best respond.[21]

11. After full consideration of the information submitted in this matter, we find that US Telecom has presented no arguments not already considered by the Commission to demonstrate a need for greater standardization of the equal access implementation processes.[22] The same concerns expressed by US Telecom concerning presubscription processing problems were raised in prior Commission proceedings but have never been demonstrated to justify the strict regulatory control over BOC internal systems and procedures proposed by US Telecom. Moreover, were it to accept US Telecom's standardization proposal at this late stage in the conversion process, the Commission as well as the carriers would be obligated to expend considerable time and resources in identifying, adopting and implementing revised procedures at a time when the remaining number of lines to be converted to equal access is relatively small.[23] Throughout the conversion process, the Commission has encouraged direct negotiations between the carriers to resolve the various transitional problems confronting the IXCs in the transition to equal access. It has generally found that the BOCs have demonstrated a willingness to work with all IXCs to eliminate whatever impediments to high quality service may exist.[24] The Commission has also supported the efforts of the telecommunications industry to develop standards governing the exchange of information between LECs and IXCs.[25] We see no reason to disturb the Commission's determination that transitional problems such as those alleged by US Telecom can best be resolved by the industry. To the extent that US Telecom claims to have encountered serious difficulties in the conversion process allegedly not experienced by AT&T, the Bureau is prepared to promptly consider any specific allegations of misconduct on the part of one or more defendants.[26] Since US Telecom's instant complaint falls short in this regard,[27] its complaint will be dismissed without prejudice.

12. Accordingly, IT IS HEREBY ORDERED that the Complaint filed by US Telecom, Inc. IS DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

## FOOTNOTES

[1] On July 1, 1986, US Telecom merged with GTE Sprint Communications Corporation to become U.S. Sprint Communications Company (U.S. Sprint). *See* Memorandum Opinion and Order, Mimeo No. 5210 (released July 18, 1986). The complainant will be referred to herein as "US Telecom".

[2] Pursuant to the Modification of Final Judgment, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) (*MFJ* ), Bell Operating Companies (BOCs) are required to provide exchange access to all interexchange carriers (IXCs) that is "equal in type, quality and price to that provided to AT&T and its affiliates." *Id.* at 227. The initial aspects of the equal access conversion process were established in the *MFJ* and in a subsequent decision implementing that decree. *See* United States v. Western Electric Co., 569 F. Supp. 1057, 1060 (D.D.C. 1983) (*MFJ Implementation Order* ). The Department of Justice (DOJ) is responsible for enforcing the *MFJ* and has exercised this authority by requiring BOCs to file compliance plans with respect to equal access conversions. *See* Report of the United States Concerning Equal Access Implementation (filed Feb. 7, 1986) in United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C.).

[3] Presubscription is the process by which customers may select a primary interexchange carrier (PIC), from among several available (IXCs), for long distance dialing before an end office is converted to equal access. All non-presubscribed customers, customers that fail to elect a PIC, are allocated randomly to participating IXCs in the same proportion as presubscribed customers on the equal access cutover date. The Commission, which has concurrent jurisdiction over the equal access process under the Communications Act, has established rules governing the presubscription practices of the BOCs when converting end offices. *See* Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 711 (1985) (*Allocation Order* ), *modified on reconsideration*, 102 FCC 2d 503 (1985) (*Modified Allocation Order* ). While the *Allocation Order* specifically requires all local exchange carriers (LECs) to establish appropriate mechanisms in order to provide their customers and the IXCs with specific types of information necessary to effectuate customers' PIC selections, LECs and IXCs are allowed considerable flexibility in creating their own internal systems, schedules and procedures for processing customer conversions so long as the fundamental equal access implementation requirements set forth in the *MFJ* and the *Allocation Order* are met. *Allocation Order* at 924-27 and App. B.

[4] Section 202(a), 47 U.S.C. § 202(a), prohibits common carriers from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services . . . ." The failure of a BOC to provide equal access to IXCs when required to do so could be found to be unreasonably discriminatory in violation of Section 202(a). US Telecom does not allege that BOCs are intentionally discriminating against nondominant IXCs in favor of AT&T. Instead, it claims that problems with the BOCs' presubscription processes and procedures prevent IXCs from receiving access equal to that obtained by AT&T.

[5] US Telecom alleges that the nondominant IXCs are disadvantaged since AT&T already possesses certain customer information which other IXCs can only obtain through the RBOC conversion processes.

[6] *See MFJ*, 552 F. Supp. at 232-33. Subject to certain limited exceptions, each BOC was required to offer equal access from all access lines for which it received a *bona fide* request for service by September 1, 1986. In 1983 and 1984, the BOCs filed equal access compliance plans with DOJ which included schedules of the end offices they planned to convert to equal access capability and the time at which such conversions would be completed. *See supra* note 2. A recent report prepared by DOJ gave the following breakdown on the percentages of lines actually converted to equal access by each of the seven RBOCs as of the September 1, 1986 deadline: The Ameritech Companies 76.7%; Bell Atlantic 79.2%; BellSouth 69.5%; NYNEX 55%; Southwestern Bell 74.7%; Pacific Telesis 72.2%; and U.S. West 72.9%. *See* Report of the United States to the Court Concerning Status of Equal Access (filed Oct. 31, 1986) in United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C.).

[7] *See* FCC Announces Formation of Equal Access Task Force, Public Notice No. 1850 (released January 6, 1986).

[8] *See* Public Notice No. 5313 (released June 23, 1986).

[9] Comments were filed by: (1) Bell Atlantic; (2) BellSouth Corporation on behalf of South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company; (3) Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Telephone Company; (4) Southwestern Bell Telephone Company; (5) The Ameritech Companies; (6) Pacific Bell and Nevada Bell; (7) New York Telephone Company and New England Telephone and Telegraph Company; (8) Western Union Telegraph Company; and (9) United States Transmission Systems, Inc.

[10] US Telecom claims that the problem is most severe in the Bell Atlantic region where over 25 percent of the customer complaints received by its Mid-Atlantic Region's Customer Service Division were allegedly generated by misassignment.

[11] A CRIS is the exchange carrier's data entry file on its customers in a particular service area and includes certain proprietary information as well as the customer's selected primary long-distance carrier and date of selection.

[12] US Telecom states that the Single Point of Contact (SPOC) units recently established by the RBOCs to serve as focal points for resolving misassignment complaints are too few and lack adequate internal tracking procedures to handle efficiently the multitude of misassignment problems.

[13] US Telecom alleges that on one occasion, Bell Atlantic lost a US Telecom customer tape containing orders for 1,600 lines but failed to notify it of the loss until 30 days later. As a result, US Telecom claims, it was required to recreate the tape, a process that required "two days' programming time and, frustratingly, 200 customers' orders [were] lost from the original tape." US Telecom states that all of these customers subsequently discontinued US Telecom service.

[14] According to US Telecom this information (billing name and address, customer name and address, and working telephone number) enables it to know the number of lines a customer has, ensure that all lines are included for US Telecom service if that is the customer's desire, and permits the entry of accurate line information into the database so that billing and servicing are done correctly.

[15] CARE was developed by the Network Operations Forum (NOF) under the Carrier Liaison Committee of the Exchange Carrier Standards Association (ESCA) as a forum for bilateral LEC and IXC discussions regarding the exchange of customer account information. The ESCA, officially endorsed by the Commission, was established voluntarily in 1983 by members of the wireline exchange carrier industry to address exchange access interconnection standards and other technical issues on a nationwide basis. *See* MTS and WATS Structure, Phase III, Memorandum Opinion and Order, CC Docket No. 78-72 (released January 17, 1985).

[16] The opponents cite the Commission's actions in Investigation into the Quality of Equal Access Services, RM-5196, 60 RR 2d 417 (released May 23, 1986), and GTE Sprint Communications Corporation, Notice of Proposed Rulemaking, CC Docket No. 85-348 (released December 5, 1985).

[17] See *Allocation Order*, 101 FCC 2d at 924-26 and App. B.

[18] See *Modified Allocation Order*, 102 FCC 2d at 515-517.

[19] GTE Sprint Communications, Notice of Proposed Rulemaking, CC Docket No. 85-348 (released December 5, 1985).

[20] *Id.* at 10. The Commission did, however, determine that two issues raised in the petition warranted consideration in a rulemaking proceeding, i.e., a proposed waiver of nonrecurring charges for trunk rearrangements associated with the employment of access tandems upon conversion of an end office to equal access and a proposed requirement that certain information be provided by BOCs to the IXCs serving their operating areas. On June 3, 1986, the Commission adopted a Report and Order in the proceeding adopting the two proposals. GTE Sprint Communications Corporation, *Report and Order*, CC Docket No. 85-348, 60 RR 2d 763 (released June 13, 1986).

[21] Investigation into the Quality of Equal Access Services, Memorandum Opinion and Order at 41 (released May 23, 1986) (footnote omitted).

[22] Furthermore, although we need to address the issue given our rejection of US Telecom's standardization proposal, we conclude that US Telecom has provided no support for its argument that IXCs should be allowed direct access to standardized BOC customer databases. We agree with the opponents that, unqualified, this proposal would allow IXCs to access customer proprietary information as well as information concerning competing IXCs.

[23] *See supra* note 6.

[24] In this regard, we note that the opponents here generally reiterate their willingness to cooperate with US Telecom in resolving the issues raised in its complaint. Moreover, a review of our files indicates that the number of complaints regarding BOC presubscription practices has diminished substantially over time as the BOCs have gained experience in implementing the Commission's ballot and allocation plan.

[25] *See* Investigation into the Quality of Equal Access Services, *supra*, n. 23 at 19-21; *see also*, *Modified Allocation Order*, 102 FCC 2d 516-17. We expect all BOCs to provide equal acces in a manner reasonably responsive to the requirements of all IXCs. Thus, we encourage the BOCs to adopt industry recommended record exchange formats such as the CARE system adopted by the NOF. If an IXC encounters a specific problem with BOC conversion processes or procedures, we will examine the evidence surrounding any such complaint to determine if the BOC's failure to follow industry standards is unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

[26] It should be noted that the Commission currently has before it a petition filed by the Illinois Citizens Utility Board (Ill CUB), requesting that the Commission adopt proposed rules clarifying the rights of customers not to be responsible for change charges associated with an unauthorized change in their presubscribed IXC. Illinois Citizens Utility Board, Petition for Rulemaking, filed May 27, 1986. The Bureau's action today in no way disposes of the issues raised in Ill CUB's petition.

[27] In its reply, US Telecom disclaims any intent to "pinpoint blame" on any particular carrier, stating instead that "the Task Force should [concentrate] on the overall generic problems associated with the equal access process."

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In Re Application of

CELLULAR ADVANCED RADIOPHONE SYSTEMS, INC. d/b/a CARS — File No. 30638-CL-P-096-A-84

For authority to construct a Domestic Public Cellular Radio Telecommunications System in the Fort Wayne Metropolitan Statistical Area

In Re Applications of

COMMUNICATIONS PROPERTIES, INC. — File No. 00080-CL-AL-1-87

PROVIDENCE JOURNAL CELLULAR RADIO, INC.

For authority to assign authorization

## ERRATUM AND ORDER

**Adopted December 5, 1986; Released December 10, 1986**

By the Common Carrier Bureau:

1. On November 20, 1986 the Bureau released a Memorandum Opinion and Order granting the application of Cellular Advanced Radiophone System, Inc. d/b/a CARS (CARS).[1] However, it has come to our attention that a minor amendment filed by the applicant on March 26, 1986 was inadvertently omitted from the file. This amendment reported that through a series of *pro forma* ownership changes, previously approved by the Commission; Providence Journal Cellular Radio, Inc. (PJCR) had acquired 100% ownership interest in CARS. In a subsequent amendment, CARS stated that as a result of corporate reorganization control of CARS was transferred to Communications Properties, Inc. (CPI) the sole shareholder of CARS.[2] Thus, the captioned application to construct should have been granted to CPI. We are therefore correcting our previous order to reflect this change.

2. The Order also stated that the applicant's Cellular Geographic Service Area (CGSA) and 39 dBu contours extended beyond the MSA. In fact only the contours, and not the CGSA, extend beyond the MSA. Thus, we are also correcting the Order to this effect.

3. Finally, former paragraph 8 is renumbered as paragraph 9 and a new paragraph 8 is added to read as follows:

8. IT IS FURTHER ORDERED, That all the other mutually exclusive applications filed in this market ARE HEREBY DISMISSED.

4. On December 1, 1986, CPI filed an application for authority to assign the Fort Wayne license to Providence Journal Cellular Radio, Inc., (PJCR) File No. 00080-CL-AL-1-87. Since PJCR is a 56.2% owner of CPI this assignment is deemed *pro forma* and as such is approved.

5. Accordingly, IT IS ORDERED, That the application of Communications Properties, Inc., File No. 00080-CL-AL-1-87, IS GRANTED and the authorization IS ASSIGNED to Providence Journal Cellular Radio, Inc.

6. This Order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b) (2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

### FOOTNOTES

[1] *Cellular Advanced Radiophone Systems*, Inc., DA 86-233, released November 20, 1986.

[2] See Amendment filed by Cellular Advanced Radiophone Systems, Inc., File No. 30554-CL-P-117-A-84, Colorado Springs market, on November 21, 1986, incorporated by reference herein.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 85-364

| | |
|---|---|
| CLASSIC VISION, INC. | File No. BPCT-850529KE |
| 4-A COMMUNICATIONS | File No. BPCT-850725KI |
| INDEPENDENT CONCEPTS | File No. BPCT-850725KP |

For a Construction Permit
Las Vegas, Nevada

## MEMORANDUM OPINION AND ORDER

**Adopted: December 4, 1986; Released: December 11, 1986**

By the Review Board:

1. The Review Board has before it for consideration the "Exceptions to the Initial Decision" filed October 27, 1986 by El Sol Broadcasting (El Sol), a former applicant in this proceeding, and responsive motions to dismiss filed by Independent Concepts and 4-A Communications. El Sol's "exceptions" were filed after the presiding Administrative Law Judge (ALJ) approved a settlement agreement, dismissed the applications of Classic Vision, Inc. and Independent Concepts, and granted the 4-A Communications application for a new commercial television station at Las Vegas, Nevada. *Memorandum Opinion and Order*, FCC 86M-2976, released October 2, 1986. Five months prior thereto, the ALJ had dismissed the El Sol application for failure to prosecute. *Memorandum Opinion and Order*, FCC 86M-1441, released April 28, 1986. [1]

2. We begin by noting that, because there has been no initial decision issued in this proceeding and because El Sol's argument challenges only the ALJ's *MO&O* dismissing its application, El Sol's pleading before the Board cannot be regarded as exceptions filed pursuant to Section 1.276 of the Rules, 47 CFR §1.276. In addition, El Sol's pleading may not properly be considered as an appeal filed pursuant to 47 CFR §1.302 because, although it was filed within 30 days after the release of the ALJ's order approving the settlement agreement and terminating the proceeding, El Sol does not object to the ALJ's resolution of the matter before him in that order, *viz*, whether the settlement agreement complies with 47 U.S.C. §311(c) and 47 CFR §73.3525. Moreover, El Sol did not file the preliminary notice of appeal required by 47 CFR §1.302(b).

3. Thus, the El Sol pleading can only be viewed as a grossly untimely appeal from the ALJ's April 1986 *MO&O* dismissing its application and terminating El Sol's right "to participate as a party" to the proceeding, *see* 47 CFR §1.301(a)(1). The deadline for filing such an appeal was 5 days after the release of the ALJ's *MO&O* on April 28, 1986. 47 CFR §1.301(c)(2). El Sol did not file its instant pleading until October 27, 1986, some six months later, and it had no right whatever to defer its appeal and later raise it as an "exception." *See* 47 CFR §1.301(a), which clearly states: "An appeal from such a ruling may not be deferred and raised as an exception to the initial decision." Therefore, we shall dismiss El Sol's late-filed appeal. As the Commission has recently emphasized in affirming the dismissal of another applicant:

> "For some time now there has been a growing interest in new and expanded communications services, as reflected in an increasing number of applications, and, more importantly, a demonstrated public demand for such services. Hence, we have placed a greater emphasis on our responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service disserves the public interest.... Consistent with this determination that new service should be provided to the public in the most efficient, expeditious manner possible, ALJs must be given broad discretion to regulate the course of multiparty comparative hearings.

*Hillebrand Broadcasting, Inc.*, FCC 86-426, released November 6, 1986 (Comm'n) (footnote omitted), *affirming*, 102 FCC 2d 804 (Rev. Bd. 1985), *recon. denied*, 102 FCC 2d 809. [2] It appears that El Sol's logy interest in its defunct application may have been reawakened by the crispy crinkle of the settlement dollars changing hands between its erstwhile competitors. We have previously noted the miraculous powers of reincarnation on a long-interred applicant that fresh settlement money seems to hold. *South Florida Broadcasting Co., Inc.*, 100 FCC 2d 973, 975 (1985). The law here not allowing for metempsychosis, El Sol must, again, set peacefully on the Nevada range.

4. ACCORDINGLY, IT IS ORDERED, That the appeal ("Exceptions to the Initial Decision") filed October 27, 1986 by El Sol Broadcasting IS DISMISSED, and the motions to dismiss filed October 30 and 31, 1986 by Independent Concepts and 4-A Communications, respectively, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

### FOOTNOTES

[1] The ALJ dismissed the El Sol application after finding that: (1) El Sol failed to submit any statement of its integration and diversification proposals despite the ALJ's order affixing March 10, 1986 as the submission date for each applicant's proposals; (2) although petitions to enlarge issues were filed against El Sol, it failed to respond to some, and its answers to the others were perfunctory and lacking incredibility; and (3) El Sol failed to attend the prehearing conference. From these failures, the ALJ reasoned that El Sol's "lack of concern about its application and unwillingness to comply with the Commission's rules leads to the conclusion that El Sol does not intend to prosecute its

application;" therefore, he dismissed the El Sol application. FCC 86M-1441, *supra*, at para. 3. El Sol has failed to identify any special circumstances which might require reinstatement of its application; instead, the pleadings before us confirm the soundness of the ALJ's ruling *See Classic Vision, Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986) (and cases cited therein), *appl. rev. pending; see also Hillebrand Broadcasting, infra* para. 3 (dismissal of application is appropriate remedy for failure to timely comply with procedural and substantive rules, including ALJ's order) *(citing Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058 (1978)).

[2] El Sol's status as a *pro se* applicant does not justify its significant procedural lapses before the ALJ and the Board. For, as the Board has recently reemphasized, a party who has elected to act without counsel is not relieved of its burden of becoming acquainted with, and conforming to, the requirements of the Commission's procedural rules. The Commission cannot excuse the disruption of its administrative processes because a party, who decides to proceed *pro se*, is unfamiliar with Commission rules and procedures." *Haughton Partnership, Ltd.*, FCC 86R-52, released August 15, 1986 (Rev. Bd.), at para. 3 *(citing Silver Beehive Telephone Co.*, 34 FCC 2d 738 (1977)); *cf. Trefoil Broadcasting Co., Inc.*, 94 FCC 2d 928, 933 (Rev. Bd. 1983), *rev. den. sub nom. Royce International Broadcasting Co.*, FCC 84-588, released November 24, 1984, *modified*, 103 FCC 2d 1173 (1986), *appeal pending*, No. 84-1639 (D.C. Cir. filed December 28, 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 86-422

In the Matter of

| | |
|---|---|
| Amendment of the rules regarding | RM-4637 |
| control and security alarm devices | RM-4813 |
| under Part 15. | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 22, 1986; Released: December 12, 1986**

By the Commission:

### Introduction

1. The Commission has before it four petitions to amend the regulations and the test procedures used by the Commission for Part 15 control and security alarm devices. These are: 1) a petition for rule making, RM-4637, filed on October 5, 1983, by the Door Operator and Remote Controls Manufacturers Association (DORCMA); 2) a petition for rule making, RM-4813, filed on June 12, 1984, by the Security Equipment Industry Association (SEIA); 3) requests for waiver and stay filed on October 12, 1984, by Transcience Industries; and, 4) a petition for partial stay filed on November 21, 1984, by SEIA. Other petitions have also been filed and previously acted upon by the Commission. DORCMA, on October 5, 1983, filed a Petition to Stay the Effectiveness of FCC Orders in Docket No. 20990. That petition was granted by the Commission on January 12, 1984, in an *Order Granting Partial Stay*.[1] The Alarm Device Manufacturing Co., a division of Pittway Corp., (Ademco/Pittway) filed a Petition for Waiver on November 22, 1983, which was granted by the Commission on January 16, 1984, in an *Order Granting Waiver in Part*.[2]

2. The regulations and measurement procedures of concern to the petitioners were adopted by the Commission in a *Report and Order* (R&O)[3] and a *Memorandum Opinion and Order* (MO&O)[4] in Docket No. 20990. These orders changed the regulations by allowing wireless security alarm systems to operate under the rules that applied to garage door opener controls.[5] In addition, we provided further detail as to the measurement methodology, made some minor changes to the measurement procedures, and deleted the statement in the measurement procedures that emissions above 1000 MHz did not need to be reported.[6] Changes to the technical standards included establishing new emission limitations for spurious and harmonic emissions and relaxing the emission limitations for unwanted emissions in certain restricted frequency bands.[7] The petitions requested a number of changes in the technical standards adopted in the above proceeding and the measurement procedures used by the Commission to determine compliance with these standards.

### Discussion

3. The Commission believes that its previous actions in establishing technical standards and measurement procedures for control and security alarm devices has gone a long way towards mitigating the interference potential of these devices. In addition, there is a continued concern regarding the interference potential of emissions in the restricted frequency bands. However, after full consideration of the petitions and comments, the Commission feels that the emission levels in the restricted frequency bands above 1000 MHz should be changed and a small readjustment in the measurement procedure should be given consideration. Although the petitions requested other changes to rules adopted in Docket 20990, there is no new evidence or compelling reasons beyond those already addressed in the proceedings that established the regulations for control and security alarm systems to persuade us to consider any other changes to those earlier decisions.

4. Our review of the record in this proceeding shows a clear consensus on the part of industry that our emission limit of 125 uV/m in the restricted frequency bands above 1000 MHz is unnecessarily low. The commenters have argued that it is difficult technically and economically to meet this standard. However, because of the wide variation in alternative emission levels proposed for these bands in the comments, a public meeting was held on May 23, 1986, in an effort to more fully understand the problem being encountered by industries in meeting the technical standard. At this meeting, the industries were invited to provide additional comments in this proceeding which would provide the Commission with information necessary to support a more appropriate limit.

5. While most of the resulting comments generally recognize the need to protect services operating in the restricted frequency bands, the majority of commenters state that there is no technical justification for the spurious and harmonic limit of 125 uV/m. Moreover, they point out that there have been no cases of interference reported to the Commission from the millions of operating devices already exceeding the 125 uV/m level in these bands. As one comment claimed, normal background noise can exceed the 125 uV/m level on the frequencies in question.

6. While several comments claim that the present limit is attainable with current technology and at an affordable price, the majority of comments stated that they believed that a limit of 500 uV/m is a more reasonable level of protection to services operating in the restricted frequency bands. We agree that equipment can be designed in such a manner as to be capable of complying with the existing regulations using the measurement techniques employed by the Commission's laboratory. However, we are not fully convinced that the level of 125 uV/m is necessary to protect services in the restricted bands or that this limit does not impose an unnecessary economic burden on the industry.

7. On the issue of measurement procedures, we believe that the procedure adopted in Docket No. 20990 provides the necessary standardization and measurement repeatibility and has generally been accepted by industry. No new information has been presented in the petitions or in the subsequent comments that would justify changing those measurement procedures with the exception of a possible change in measurement interval used for determining the average of the signal level to show compliance with the

emission limits. The comments have established a valid reason for a change in this technical specification. Commenters have proposed to make the measurement interval equal to one full code frame (including blanking time), or 0.1 second, whichever is less.

8. The regulation that details the procedure to average a pulsed emission (see Section 15.205(b)) was based on the use of a field strength meter. Thus, the regulation specified that an averaging period of 100 milliseconds should be employed. This time interval is consistent with the American National Standard Institute (ANSI) specifications (C63.2-1980) for electromagnetic noise for field strength instrumentation, 10 kHz to 1 GHz. However, a number of manufacturers and the Commission's Laboratory staff employ spectrum analyzers to measure field strength. In order to obtain a more accurate measurement of the field strength of the radiated signal when using a spectrum analyzer, the measurement should be made by averaging a pulsed emission over one complete pulse train, including blanking intervals, or over 100 milliseconds, whichever is the shorter time interval.

**Commission Action**

9. After giving full consideration to the petitions and comments in this proceeding, the Commission believes that persuasive arguments have been presented to issue a *Notice of Proposed Rule Making* to address two remaining issues. Specifically, we are proposing in this *Notice* to amend the regulations to permit spurious emission levels from control and security alarm devices of up to 500 uV/m at 3 meters in the restricted bands above 1000 MHz. We believe that this level is sufficient to maintain a low probability of interference to authorized services. Specific comments are requested concerning the merits of and objections to adopting this proposed limit, retaining the existing limit of 125 uV/m at 3 meters, or permitting another limit. These comments should be supported by a detailed technical analysis regarding the requested emission limit. In addition, the *Notice* proposes to permit averaging a pulsed emission over one complete pulse train, including blanking intervals, or over 100 millisecond, whichever is the shorter time interval, in order to more accurately determine the average of the emission when employing a spectrum analyzer.

10. Additional amendments to the language and the emission table in Section 15.205 are proposed to clarify the intent of this rule Section. Paragraph (a) has been reworded to indicate that the fundamental frequency, modulation components and out-of-band emissions from the transmitter as well as the associated receiver shall not fall within the restricted frequency bands. The table in paragraph (b) has been revised to indicate those frequency bands below 470 MHz in which the fundamental signal and modulation components are permitted. Based on this revision, only spurious emissions below the established limits will be allowed in the restricted frequency bands. The proposals are shown in Appendix B.

11. Based on comments filed in this proceeding as to the length of time needed to design and manufacture new products which could comply with the proposed emission limit, it is proposed that within two years following the adoption of a final order in this proceeding all equipment submitted to the Commission's Laboratory for authorization must demonstrate compliance with the regulations. Within 30 months, all equipment manufactured must comply with the regulations. No cut-off date on the marketing of equipment produced under the stay or waivers is being proposed. This will allow manufacturers to continue to provide replacement components.

**Procedural Matters**

12. Pursuant to the Regulatory Flexibility Act of 1980, 5 USC 601 *et seq.*, the Commission issues the following initial regulatory flexibility analysis:

**I. Reason for Action.**

Control and security alarm devices generate radio frequency emissions that could interfere with or degrade the operation of some authorized radio services. There is a need to protect these authorized services from interference.

**II. The Objective.**

It appears that the Commission may be able to relax some of the standards on the permitted level of radiated emissions in the restricted bands above 1000 MHz without unduly increasing the potential for interference to authorized users of the radio spectrum.

**III. Legal Basis.**

The action proposed is in accordance with Sections 4(i), 302, 303(e) 303(f), and 303(r) of the Communications Act of 1934, as amended, which permit the Commission to make reasonable regulations governing the potential interference of radio frequency equipment.

**IV. Entities Affected; Nature of Economic Impact; Significant Alternatives.**

No significant economic impact should result from the proposed rules. These proposed regulations amount to a relaxation of the existing regulations. Some impact may be felt by those manufacturers that have not yet begun to design devices that comply with the existing regulations.

**V. Recordkeeping, and Other Compliance Requirements.**

None beyond those required under the existing regulations.

13. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

14. For the purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time that a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any persons who make an oral *ex parte* presentation addressing matters not fully covered in any previously-

filed written comments for the proceedings must prepare a written summary of that presentation on the day of oral presentation. That summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules.

15. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before March 12, 1987 and reply comments on or before April 13, 1987. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. For further information on this proceeding, contact John Reed, Office of Engineering and Technology, telephone: (202) 653-7313.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

## APPENDIX A

**List of commenters:**

Advance Industries, Inc.
Alarm Device Mfg. Co., a division of Pittway Corp.
Alliance Mfg. Co., Inc.
Allister Mfg. Co., Inc.
Assoc. of Maximum Service Telecasters
Challenger
Chamberlain Mfg. Corp.
Capricorn Electronics
Door Operator and Remote Controls Manufacturers Association (DORCMA)
Genie Home Products, Inc.
Interactive Technology, Inc.
Linear Corp.
Multi-Elmac Co.
National Academy of Sciences
Racal Security, Inc.
RF Monolithics, Inc.
Rollins Inc.
Security Equipment Industry Association (SEIA)
Transcience Industries
Underwriters Laboratories, Inc.

## APPENDIX B

Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

PART 15 – RADIO FREQUENCY DEVICES

1. The authority citation for Part 15, is revised to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48, Stat., as amended, 1066, 1082, 1083; 47 USC 154, 302, 303, 307.

2. Section 15.122 is amended by revising the Note under paragraph (a) to read as follows:

**Section 15.122 Periodic operation in the bands 40.66-40.70 MHz and above 70 MHz.**

* * * * *

(a) * * *

Note. - For pulsed operation, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the averaged absolute voltage during a 0.1 second interval when the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for equipment authorization.

* * * * *

3. The authority citation for Sections 15.201 - 15.215 is removed.

4. Section 15.205 is amended by removing the Note under paragraph (a), revising the introductory text of paragraph (a), adding new subparagraphs (a) (1) and (a)(2), and by revising paragraph (b) and its Note to read as follows:

**Section 15.205 Technical standards.**

(a) The fundamental frequency, modulation components and out-of-band emissions from the transmitter as well as the associated receiver shall not fall within any of the bands listed below:

* * * * *

(1) Emissions in these bands from the transmitter or an associated receiver shall not exceed 15 uV/m at 3 meters on frequencies equal to or below 1000 MHz.

(2) On frequencies above 1000 MHz, emissions in these bands from the transmitter or an associated receiver shall not exceed 500 uV/m at 3 meters, or the spurious emission limits specified in paragraph (b) of this Section, whichever is the lower value. A power density level may be measured to show the equivalent uV/m limit.

(b) In addition to compliance with the provisions of paragraph (a) of this Section, the transmitter is limited to operation on the frequencies specified below. Emission of radio frequency energy on the fundamental frequency and the spurious and out-of-band emissions from the transmitter shall not exceed the levels in the following table:

| Fundamental frequency (MHz) | Field strength of fundamental (uV/m at 3m) | Field strength of out-of-band and spurious (uV/m at 3m) |
|---|---|---|
| 40.66 to 40.70 | 2,250 | 225 |
| 70 to 73 | 1,250 | 125 |
| 75.4 to 108 | 1,250 | 125 |
| 118 to 121.4 | 1,250 | 125 |
| 121.6 to 130 | 1,250 | 125 |
| 130 to 156.7 | 1,250 to 2,770 (1) | 125 to 280 (1) |
| 156.9 to 174 | 2,780 to 3,750 (1) | 280 to 375 (1) |
| 174 to 240 | 3,750 | 375 |
| 285 to 328.6 | 4,800 to 6,610 (1) | 500 to 660 (1) |
| 335.4 to 404 | 6,890 to 9,750 (1) | 690 to 975 (1) |
| 406.2 to 470 | 9,840 to 12,500 (1) | 985 to 1,250 (1) |
| 470 and above | 12,500 | 1,250 |

(1) Linear interpolation.

Note. - For pulsed operation, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the averaged absolute voltage during a 0.1 second interval when the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for equipment authorization.

* * * * *

## FOOTNOTES

[1] *Order Granting Partial Stay*, FCC 84-12, adopted January 12, 1984. This Order allowed garage door opener controls to demonstrate compliance with the former regulations using the earlier measurement procedures.

[2] *Order Granting Waiver in Part*, FCC 84-18, adopted January 16, 1984. This Order allowed the manufacturers of security alarm devices which were under development at the time of this Order to obtain a waiver of the requirement to report emission measurements above 1000 MHz.

[3] *See Report and Order* in Docket No. 20990, adopted October 22, 1981, 46 FR 55520.

[4] *See Memorandum Opinion and Order* in Docket No. 20990, adopted October 28, 1982, 47 FR 51754.

[5] It should be noted that most security and control devices operate on frequencies allocated to the U.S. Government.

[6] The requirement to perform measurements of unwanted emissions above 1000 MHz has been in the regulations since 1974 (*See Order* adopted November 12, 1974, FCC 74-1221). In addition, this measurement requirement was specifically proposed in the *Notice of Proposed Rule Making* in Docket 20990 (adopted November 10, 1976, 41 FR 52705) and adopted in the R&O in Docket No. 20990.

[7] These restricted frequency bands are used for radionavigation, radio astronomy, safety services and U.S. Government operations which might be affected by extraneous radio frequency signals. No emissions are permitted within these specified bands. The R&O defined "no emissions" in the restricted bands below 1000 MHZ as 15 microvolts/meter at 3 meters. The MO&O relaxed the levels in the restricted bands above 1000 MHz from no emissions detected to 125 microvolts/meter at 3 meters.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-463**

In re Applications of

STATE UNIVERSITY
OF NEW YORK File No. BPED-841113MH
(hereafter WBSU)
Brockport, New York

Has: 88.9 MHz, Channel 205A
.128 kW (H & V), 55 meters

Req: 89.1 MHz, Channel 206B
7.338 kW (H & V), 53 meters

For Modification of Facilities
for a Noncommercial Educational
FM Station

MARS HILL
BROADCASTING
COMPANY File No. BPED-841128MB
(hereafter Mars)
Webster, New York

Req: 89.3 MHz, Channel 207A
1.0 kW (H & V) 23 meters

For Construction Permit
for a New Noncommercial
Educational FM Station

## HEARING DESIGNATION ORDER

**Adopted: November 25, 1986 Released: December 12, 1986**

By the Chief, Audio Services Division

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications.

2. *Mars.* Mars' application indicates that three radials - $0^0$, $45^0$, and $315^0$ were excluded from the determination of height above average terrain since these three radials lie substantially over Lake Ontario. 47 C.F.R. § 73.313 allows for the exclusion of radials over water only in instances where the *entire* radial from 3 to 16 kilometers lies over water, and where no U.S. territory is encountered within this distance. However, the terrain profile maps show land extending past 3 kilometers for each of the three radials indicated above. Therefore, Mars must use all eight radials, and not five, when calculating the height above average terrain. Mars must file a corrective engineering amendment within 30 days of the release of this Order correcting this deficiency. A construction permit will not be issued to Mars without the Commission receipt of Canadian approval for the amended application.

3. Neither applicant has indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 FR 49560, published October 24, 1978. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

4. The respective proposals are for different communities. Consequently, it will be necessary to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

5. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

6. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the

record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications if any, should be granted.

9. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Mars shall file the corrective engineering data, pursuant to paragraph 2, with the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That, the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) as amended, and 47 C.F.R. § 73.3594, give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and in the manner prescribed in such Rules and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-464**

In re Applications of

OGDEN BROADCASTING OF VIRGINIA, INC. File No. BPH-841204MA
(hereafter Ogden)
Staunton, Virginia

Req: 94.3 MHz, Channel 232A
1.65 kW (H & V), 130 meters

STERLING BROADCASTING CORPORATION File No. BPH-850225MA
(hereafter Sterling)
Staunton, Virginia

Req: 94.3 MHz, Channel 232A
3.0 kW (H & V), 100 meters

JOHN D. VERSTANDIG File No. BPH-850226MC
(hereafter Verstandig)
Staunton, Virginia

Req: 94.3 MHz, Channel 232A
1.1 kW (H & V), 158 meters

Gail Goodrow Brown
et al. d/b/a File No. BPH-850228MG
THE STAUNTON GROUP
(hereafter Staunton)
Staunton, Virginia

Req: 94.3 MHz, Channel 232A
3.0 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

## HEARING DESIGNATION ORDER

**Adopted: November 28, 1986 Released: December 12, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

## OPINION PARAGRAPHS

**Local Notice**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S) DEFICIENCY

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause

may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT(S) WAIVER JUSTIFICATION(S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT(S) DEFICIENCY

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT(S):

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**E.E.O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

| APPLICANT(S) | DATE AMENDMENT(S) FILED |
|---|---|
| Staunton | May 15, 1986 |

**Areas & Populations**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, to-

gether with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be

**Different Communities 307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.+

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

Ogden, Staunton

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

**ISSUES**

**Main Studio**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

**City Coverage**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

Ogden, Staunton

**307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

**Comparative**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

**Ultimate**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

**ORDERING CLAUSES**

**Legal Notice**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

**E.E.O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Staunton

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**APPENDIX**

**Additional Opinion Paragraphs**

31. *Sterling*. Section II, Item 10, FCC Form 301 (1982), inquires whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that (a) voting rights will remain with the applicant, even in the event of a default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. 310(d) will be obtained. A negative response to this question requires a full explanation. Sterling answered "no" to Item 10; however, it did not submit the required explanation. Accordingly, Sterling will be required to submit an amendment to the presiding Administrative Law Judge.

32. *Other Matters*. The Commission has before it an informal objection filed by Staunton Lime Company (Staunton Lime) on October 2, 1985 against Ogden's construction permit application and a letter of inquiry filed by John T. Cook, Esq. on March 8, 1985 with regard to the Sterling construction permit application.

33. The gravamen of both pleadings is that transmission of RF energy from the proposed towers may cause a premature explosion of detonating caps and dynamite used in the quarry operations immediately adjacent to the proposed transmitter towers. Staunton Lime contends, therefore, that the presence of the transmitter tower in such proximity to the quarry poses a substantial risk to life and property.

34. Staunton Lime argues that electric blasting caps can be "prematurely and inadvertently exploded due to the presence of a strong radio-frequency (RF) energy field," due to such emissions from a transmitter tower. In support of this proposition, Staunton Lime relies upon *Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the use of Electric Blasting Caps*, (hereafter *Safety Guide* ).[2] to show that safety measures, enunciated therein, require that Ogden's transmitter, operating with an ERP of 1650 watts, should maintain a distance separation of approximately 1200 feet from the blasting area. *Safety Guide*, p. 15, Figure 6. Ogden's transmitter would be as close as 700 feet to the blasting area and virtually the entire quarry area would fall within a 1200 feet radius of the transmitter signal.

35. We have, over the years, been called upon to deal with a variety of problems associated with RF radiation. When these problems occur among transmission services subject to our licensing, we follow well-defined procedures which, in most cases, lead to correction of the difficulty. When, however, as here, the parties aggrieved are not applicants, permittees, or licensees, our policy is to grant relief only upon a showing that there is an RF shock or burn hazard or the potential for harmful effects to humans due to excessive exposure to RF radiation. *WGUN, Inc.*, 27 FCC 2d 748 (1971); *see also, Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency*, OST Bulletin No. 65, October 1985. Here, no such showing has been made or alleged. Nevertheless, while the RF radiation involved here does not pose a direct threat to human life or property, it may present an indirect danger to the operation of the quarry and its personnel. Where the potential for such mishap exists, the Commission has stated that: "When . . . an RF-related problem may endanger human life, we do not consider ourselves bound by existing precedent and will take all measures we consider necessary to alleviate the hazard." *Pier San of Nebraska,Inc.*, 62 FCC 2d 981, 985 (1977). Therefore, Staunton Lime and Mr. Cook will be made parties to the hearing and an issue will be added to determine whether the proposed sites of Odgen and Sterling pose a threat to human safety.

Additional Issue Paragraph

1. To determine whether the proposed sites of Ogden and Sterling pose a threat to human safety.

Additional Ordering Paragraphs

36. IT IS FURTHER ORDERED, That Sterling shall submit its explanation for answering "no" to Section II, Item 10, FCC form 301 (1982), to the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED, That the Staunton Lime Company and John T. Cook ARE MADE PARTIES to this proceeding with respect to whether the proposed sites of Ogden and Sterling pose a threat to human safety.

## FOOTNOTES

[1] The application of Jerry Lee Dowd (ARN-850227MC) was returned as unacceptable for filing, and upon resubmission has been found deficient and returned again by separate action.

[2] Published by the Institute of Makers of Explosives and approved by the American National Standards Committee on Radio-Frequency Radiation Hazards, 1981 Edition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-87-014

Application for authority to acquire and operate facilities for direct service to Switzerland

## ORDER, AUTHORIZATION AND CERTIFICATE

**Adopted: December 2, 1986 Released December 12, 1986**

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on October 20, 1986, by MCI Telecommunications Corp. (MCI), requests authority to lease and operate satellite and connecting facilities for direct service to Switzerland. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Switzerland by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-c-87-014 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 50 satellite voice circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean;

b. lease from Comsat International Communications, Inc. and operate 50 voice circuits in the east coast earth station;

c. lease and operate 50 voice circuits between the east coast earth station and MCI's West Orange, New Jersey office; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Switzerland and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Switzerland, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its adoption date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SATELLITE GATEWAY INTERNATIONAL, INC. File No. CSG-86-073-P/L

MCI INTERNATIONAL, INC.

Application for authority to construct and operate international earth station facilities at San Francisco, California for provision of INTELSAT Business Services and international television service.

## ORDER AND AUTHORIZATION

**Adopted: December 2, 1986 Released: December 12, 1986**

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on September 10, 1986 by Satellite Gateway International, Inc. (SGI) and MCI International, Inc. (MCII), requesting authority, pursuant to Title III of the Communications Act of 1934 and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international earth station facilities at San Francisco, California for provision of INTELSAT Business Services (IBS) and international television service. The application was placed on public notice on September 17, 1986. No comments were received. The applicants have been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS and international television service.[1]

2. The proposed facilities will consist of two 15.2 meter antennas connecting with INTELSAT V satellites in the 6/4 GHz band. The facilities will be located at the Bay Area Teleport in Niles Canyon near San Francisco, California and will be used to provide a full range of IBS and international television services to overseas points via Atlantic and Pacific Ocean satellites.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. The applicants' legal, technical, and financial qualifications to construct and operate the proposed earth station are established. The applicants have been authorized to construct and operate other IBS earth stations.[5] The proposed earth stations comply with INTELSAT performance criteria for IBS and television earth stations. Applicants have completed the necessary frequency coordination.

5. The scope of operation of the proposed stations will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the stations' digital format operation. To the extent that the applicants may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed stations as multipurpose earth stations would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-073-P/L is GRANTED, and SGI and MCII are authorized to construct and operate the proposed earth station facilities at San Francisco, California to provide IBS and related digital video services and international television service.[6] Before completion of equipment installation and facility activation, however the applicants should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

## FOOTNOTES

[1] See Satellite Gateway Communications, Inc., File No. I-T-C-86-045, released March 4, 1986, ITT World Communication Inc., File No. I-T-C-85-088, released April 18, 1985, AT&T *et al.*, 18 FCC 2d 402 (1969), and ITTWC *et al.*, 76 FCC 2d 26 (1980). SGI will file an application for authority to utilize Pacific Ocean satellite.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* Satellite Gateway International, Inc., File No. CSG-86-010-P/L, released March 4, 1986 and Satellite Business Systems, File No. CSG-86-021-P/L, released May 1, 1986.

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition for Notice of Inquiry to Consider Requirements for Shielding and Bypassing Civilian Communications Systems from Electromagnetic Pulse Effects. RM-5528

## MEMORANDUM OPINION AND ORDER

**Adopted: December 5, 1986 Released December 12, 1986**

By the Chief, Common Carrier Bureau

1. Before the Commission is the above captioned petition for a notice of inquiry (NOI) filed by Nickolaus E. Leggett and Donald J. Schellhardt (Petitioners) requesting the Commission to institute a proceeding (1) to address the effect of Electromagnetic Pulse (EMP) on civilian communications systems: and (2) to possibly establish countermeasures. Notice of the petition was issued on August 12, 1986 (Report No. 1609). Comments were filed by the GTE Service Corporation (GTE) and reply comments were filed by the Petitioners.

2. According to Petitioners, "EMP is an intense burst of electromagnetic energy that is generated by a high-altitude nuclear explosion." Purportedly, a single burst could blanket the entire continental United States with an intense electromagnetic pulse and disable most solid-state electronic devices. Our telecommunications systems are comprised of many of these devices. Based on their research, Petitioners conclude that most efforts addressing the subject have occurred in the military sector. Because of the potential cumulative, devastating effects of EMP on this country's economy, Petitioners urge the Commission to examine, (1) the nature and extent of an EMP threat; (2) the probability of such an event; (3) its impact on the nation's various infrastructures; (4) the cost, practicality, and effectiveness of EMP protective measures; (5) steps already taken to protect communications systems; and (6) the Commission's authority to regulate measures designed to protect against its effects.

3. In its comments, GTE agrees EMP is a potential major national threat, but disagrees with Petitioners' assessment of the amount of industry/government activity currently underway addressing its impact on civilian telecommunications networks. GTE points out that in 1982 the President established the National Security Telecommunications Advisory Committee (NSTAC) to study a gamut of topics related to the subject matter. NSTAC formed a number of task forces to address specific aspects of the problem. One of those task forces, the EMP Task Force, is charged with examination of the EMP threat to terrestrial public telephone networks. It is comprised of 14 telecommunications and telecommunications related (electronics) companies. At the urging of the EMP Task Force, the American National Standards Institute Inc. T-1 Telecommunications Standards Committee is developing standards for implementing the EMP Task Force recommendations. Given the amount of review and examination of this issue ongoing outside of the Commission, GTE encourages the Commission to deny Petitioners' request for issuance of an NOI.[1]

4. Petitioners note that while GTE recognizes the merits of their concerns, it does not support development of future EMP protection policies in the proposed forum. Petitioners argue that to allow committees outside the FCC to develop EMP protection policies for civilian communications facilities would permit important policies to be made outside the framework of the Administrative Procedures Act. Petitioners argue that by issuing an NOI the Commission would become actively involved in the process, thereby permitting public participation, and public review of NSTAC/ANSI policies under a public interest standard. Moreover, Petitioners claim, the proposed NOI would not be as narrowly focused as the activities of NSTAC/ANSI.

5. Although the issues raised by Petitioners are topical and important, they do not warrant examination by the Commission at this time. A comprehensive study of these issues is in progress and should be permitted to proceed unimpeded. NSTAC/ANSI are actively engaged in research with the support of representative segments of the telecommunications industry at most risk. Moreover, based on the number of comments received the EMP issue does not appear to require an immediate public forum, and the Commission is under no obligation to commence a proceeding absent a *prima facie* showing that the public interest would be served. Given the level of preliminary technical work now underway with regard to EMP, it would be premature to institute an NOI now. Should action by the Commission become appropriate in the future, it could be initiated upon a proper showing by a party or upon our own motion.

6. Accordingly, IT IS ORDERED that the Petition for Notice of Inquiry filed by Nicholaus E. Leggett and Donald J. Shellhardt IS HEREBY DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

## FOOTNOTES

[1] GTE notes that "[t]he FCC is kept informed of NSTAC projects and, should the need arise, the Commission can obtain detailed information via the FCC's own national defense and emergency preparedness planning advisory group . . . from any of the carriers participating in the project; or the FCC could be briefed by the T-1 Committee directly." GTE Comments, pp. 2 and 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-462

In re Applications of

T. BETTE ADDINGTON File No. BPH-841025IA
(hereafter Addington)
Green Acres, California

Req: 106.3 MHz, Channel 292A
3.0 kW (H & V), 100 meters

BOGSTERIA RANDIS File No. BPH-841231MG
(hereafter Randis)
Green Acres, California

Req: 106.3 MHz, Channel 292A
3.0 kW (H & V), 100 meters

ROSE MARIE RAMIREZ File No. BPH-841231MI
(hereafter Ramirez)
Green Acres, California

Req: 106.3 MHz, Channel 292A
3.0 kW (H & V), 100 meters

FREEDOM BROADCASTING
NETWORK, INC. File No. BPH-841231MJ
(hereafter FBN)
Green Acres, California

Req: 106.3 MHz, Channel 292A
1.85 kW (H & V), 122 meters

For Construction Permit
for a New FM Station

## HEARING DESIGNATION ORDER

**Adopted: November 25, 1986 Released: December 12, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

## OPINION PARAGRAPHS

### Local Notice

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

| APPLICANT(S) | DEFICIENCY |
|---|---|
| Addington | Did not give height above average terrain for antenna, location of main studio and did not place public file in Green Acres. Did not state that a copy of the application, amendment(s) and related materials are on file for public inspection. |
| Randis | Did not place public file in Green Acres. Did not give height above average terrain for antenna. Did not state that a copy of the application, amendment(s) and related materials are on file for public inspection. |
| Ramirez | Did not give power for proposed station. Did not state that a copy of the application, amendment(s) and related materials are on file for public inspection. |

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT(S) WAIVER JUSTIFICATION(S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

| APPLICANT(S) | DEFICIENCY |
|---|---|
| FBN | Negative certification as to financial qualifications |

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT(S):

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**E.E.O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

| APPLICANT(S) | DATE AMENDMENT(S) FILED |
|---|---|
| FBN | 8/5/85; 10/22/85; 6/4/86 |

**Areas & Populations**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

**Different Communities 307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

Randis

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

**ISSUES**

**Main Studio**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

**City Coverage**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

1. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

FBN

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

Randis

**307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

**Comparative**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

**Ultimate**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

**ORDERING CLAUSES**

**Local Notice**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Addington, Randis, Ramirez

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

**E.E.O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein:

FBN

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20054.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**APPENDIX**

**Additional Opinion Paragraphs**

31. *Preliminary Matters.* FBN has filed a petition to deny and an informal objection against the application of Addington on December 31, 1984 and February 1, 1985, respectively, alleging numerous violations of 47 C.F.R. § 73.3580. Additionally, on April 15, 1985, FBN filed a petition to deny the respective applications of Randis and Ramirez again alleging numerous violations of § 73.3580. Addington has filed a motion to strike against the FBN petition while oppositions and replies have been filed by the various parties.

32. 47 U.S.C. § 309(d) provides that a petition to deny an application must be supported by an affidavit of a person or persons with personal knowledge of the facts alleged therein. FBN's December 31, 1984 petition to deny filed against the application of Addington is not accompanied by an affidavit. Therefore, the petition will be considered on its merits as an informal objection filed pursuant to 47 C.F.R. § 73.3587. The remaining petition filed against the Randis and Ramirez applications is procedurally appropriate.

33. FBN's argument that Addington, Randis and Ramirez should be dismissed for failure to comply with § 73.3580 relies on the Commission's *Public Notice* (as corrected), FCC 84-366, Mimeo 34878 (August 2, 1984), *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* ("Acceptability Public Notice"). However, FBN both misconstrues and ignores the plain language of the *Acceptability Public Notice*. The *Acceptability Public Notice* states:

> [W]e would also like to note that we have, on many occasions, granted reconsideration of an action dismissing or returning an application as unacceptable for filing when an applicant submits a relatively minor curative amendment within 30 days. In contested proceedings, the result of this procedure is that applications are accepted *nunc pro tunc*. We will continue to act favorably on such requests after an initial dismissal or return of an application as unacceptable for filing. The procedure is a reasonable accommodation to applicants who wish to participate in the comparative proceeding . . . .

34. Accordingly, such a course of action toward those applicants herein who did not fully satisfy the requirements of § 73.3580 within their allotted 30-day periods, though urged by FBN, would be both inappropriate and a meaningless exercise. It would be inappropriate because we have consistently allowed applicants to accomplish or complete their local-public-notice obligations and thus perfect their application's acceptability for filing after acceptance for filing--even after dismissal for inadvertent acceptance for filing--especially in cases where mutual exclusivity exists. It would be a meaningless exercise because of the policy, specifically described by the *Acceptability Public Notice* as an unchanged one, of granting reconsideration and reacceptance *nunc pro tunc* where an applicant cures an acceptability defect by means of a timely petition for reconsidera- tion and a minor, curative amendment. Thus, were we to dismiss the various applications as FBN urges we would have to wait 30 days for any timely petitions for reconsideration and curative amendments. If any were forth- coming, we would be bound to reinstate such applications. Nothing would be introduced into this proceeding by such a course of action except further delay, and no such dismissals would occur. See *Hearing Designation Order* in MM Docket No. 86-49, 51 Fed. Reg. 5601 (1986).

35. Applicants are expected to comply fully with the Commission's Rules concerning local notice of filing of broadcast applications. A review of Addington's, Randis' and Ramirez's local notices, as provided by FBN, reveals several deficiencies and/or omissions. Accordingly, each applicant will be required to republish their local notices. (See Opinion paragraph 4 and Ordering clause 20 herein.)

36. FBN believes that because of the defects contained in Addington's, Randis' and Ramirez's local notices, their certifications as to compliance with § 73.3580 are false and as a result their applications should be returned. While it is true that these local notices did contain defects and omissions, applicants can now certify that they have met the requirements of § 73.3580. The Commission no longer requires applicants to file copies of their local notice with their applications. Consequently, FBN's allegation that these applicants submitted false certifications would be an attempt to specify a pre-designation issue.

37. Since the Commission's *Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the allegation that Addington, Randis and Ramirez submitted false local notice certifications has not been considered herein. Accordingly, an opportunity to raise this allegation will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

38. Based on the foregoing, there is no basis to warrant return or dismissal of the applications of Addington, Randis or Ramirez. Therefore, FBN's informal objections and petition to deny will be denied and Addington's motion to strike will be dismissed as moot.

39. *Addington*. In response to Section V-B, Item 9, of FCC Form 301, Addington states that the overall height of the complete structure above ground (without obstruction lighting) is 225.3 meters. This figure is inconsistent with the value of 112.5 meters provided in the antenna sketch (Exhibit E-6). Accordingly, within 30 days of the release of this Order Addington will be required to file a clarifying amendment as to the correct value with the presiding Administrative Law Judge.

40. *FBN*. Section II, Item 10, of FCC Form 301, inquires whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that (a) voting rights will remain with the applicant, even in the event of a default on the obligation; and (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. § 310(d)) will be obtained. A negative response to this question requires a full explanation. FBN answered "no" to Item 10; however, it did not submit the required explanation, it merely answered "not applicable". Accordingly, within 30 days of the release of this Order, FBN will be required to submit an amendment to the presiding Administrative Law Judge which includes an exhibit explaining its negative response.

**Additional Ordering Clauses**

41. IT IS FURTHER ORDERED, That the petition to deny filed by FBN against Addington IS DISMISSED and when considered as an informal objection IS DENIED; that the informal objection filed by FBN against Addington IS DENIED and that Addington's motion to strike FBN's petition to deny IS DISMISSED AS MOOT.

42. IT IS FURTHER ORDERED, That the petition to deny filed against the applications of Randis and Ramirez ARE DENIED.

43. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Addington shall file with the presiding Administrative Law Judge an amendment giving the correct value of the overall height of the complete structure above ground (without obstruction lighting).

44. IT IS FURTHER ORDERED, That FBN shall submit an exhibit explaining its negative response to Section II, Item 10, of Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-465**

In re Applications of

AJB BROADCASTING, INC. File No. BPH-850313MC
(hereafter AJB)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.85 kW (H & V), 640 meters

NEW LIFE ENTERPRISES, INC. File No. BPH-850509MC
(hereafter New Life)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.87 kW (H & V), 636 meters

ROSALIE LOPEZ BUSTOS File No. BPH-850530MG
(hereafter Bustos)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.85 kW (H & V), 648 meters

MT. BULLION COMMUNITY BROADCASTING, INC. File No. BPH-850531MA
(hereafter MBCB)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.85 kW (H & V), 643 meters

EDWARD E. ABRAMSON File No. BPH-850531MO
(hereafter Abramson)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.80 kW (H & V), 640 meters

PETER E. BAIRD File No. BPH-850531MP
(hereafter Baird)
Mt. Bullion, CA
Req: 99.9 MHz, Channel 260B
1.80 kW (H & V), 640 meters

For Construction Permit
for a New FM Station

## HEARING DESIGNATION ORDER

**Adopted: November 28, 1986 Released: December 15, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

## OPINION PARAGRAPHS

**Local Notice**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S) DEFICIENCY

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT(S) WAIVER JUSTIFICATION(S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

| APPLICANT(S) | DEFICIENCY: |
|---|---|
| MBCB | Its June 4, 1986 amendment has changed its "Yes" answer to the financial certification questions in Section III, Form 301 to "No". |

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT(S):

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**E. E. O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

| APPLICANT(S) | DATE AMENDMENT(S) FILED |
|---|---|
| AJB | March 12, 1986; October 14, 1986 |
| New Life | September 19, 1985; February 10, 1986 |
| Bustos | October 11, 1985; October 28, 1985; September 23, 1986 |
| MBCB | October 22, 1985; June 4, 1986 |

**Areas & Populations**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

14. The respective proposals, although for different cable icable communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

**Different Communities 307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

**ISSUES**

**Main Studio**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by

the following applicant(s):

**City Coverage**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

1. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified: MBCB

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

**307(b)**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations,

and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

**Contingent Comparative**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

**Comparative**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

**Ultimate**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

**ORDERING CLAUSES**

**Local Notice**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

**Main Studio Justification**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

**City Coverage Waiver**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

**Financial Qualifications**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

**Programming Statement**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

**E. E. O.**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

**Late Filed Amendments**

| Applicable | Inapplicable |
|---|---|
| [X] | [ ] |

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein:

AJB, New Life, Bustos, MBCB.

**Air Hazard**

| Applicable | Inapplicable |
|---|---|
| [ ] | [X] |

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20054.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**APPENDIX**

**Additional Opinion Paragraphs**

31. MBCB has filed an informal objection to the applications of Baird and Abramson alleging that these applicants had no reasonable assurance of the availability of their proposed site and had misrepresented such assurance in their applications. In support, MBCB provided affidavits by Robert C. Hughes, a co-owner of the site, and Charles S. Hughes, his son and "Site Manager," disavowing any "reasonable assurance" of site availability to Abramson or Baird. We note, however, that all the parties in this proceeding have specified the identical site, i.e., mounted on the existing KUBB-FM antenna tower. Although the affidavits of Messrs. Hughes do not claim that the site they control is the KUBB-FM antenna tower site, the certifications submitted by Abramson and Baird claim that the person contacted was "Robert Hughes." MBCB has also provided a copy of a lease agreement for this site between Eric R. Hilding, President and 50% shareholder of the applicant, and Robert C. Hughes and Wanda E. Hughes, the owners of the site. This agreement, "contingent upon FCC approval," noted that the site "is being held in reserve, specifically, for this project." The Bustos application also included a statement from Mr. Chuck Hughes, the "Site Manager," that this antenna space "would be reserved for Channel 260B and will be rented to the recipient of the grant from FCC." MBCB did not contest this representation. Consequently, we conclude that no site availability issue is present in this instance and that the Baird and Abramson proposals are tenderable since they have not specified "an unavailable site . . . [which would] frustrate the Commission's goal of expeditious introduction of service." *Report and Order* in MM Docket No. 84-750, FCC 85-125, released May 6, 1985, at Appendix D. As to the allegation that Baird and Abramson had misrepresented their receipt of reasonable assurance of site availability, the sole contention goes to the question of site certification, and consideration of such an issue at this stage would be premature. Since the Commission's *Report and Order* in re *Revised Processing of Broadcast Applications*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matter sought to be raised in this objection has not been considered. Accordingly, an opportunity to raise this allegation contained therein will be afforded the parties post designation pursuant to Section 1.229 of the Commission's Rules.

32. MBCB has also filed a petition to deny the applications of AJB, New Life, Bustos, Abramson, and Baird for alleged failure to comply with the local notice provision of Section 73.3580 of the Commission's Rules and, therefore, for providing false certification of such compliance in their applications. We note that all applicants certified in Section VII of Form 301 that they would comply with the local notice provision of Section 73.3580. Such a threshold showing meets the tenderability criteria found in our *Report and Order* in MM Docket No. 84-750, FCC 85-125, released May 6, 1985, at Appendix D. It does appear, however, that New Life has failed to publish in the appropriate daily newspaper, the Merced Sun-Star, but published instead in a weekly newspaper, the Mariposa Gazette, in contravention of Section 73.3580(c)(1)(iii). Consequently, we will require that New Life republish in the appropriate daily newspaper within 30 days of the release of this Order.[1]

33. Any further consideration and evaluation of the alleged local notice "misrepresentation" issue, however, would be premature at this stage. Accordingly, an opportunity to raise this allegation will be afforded the parties post designation pursuant to Section 1.229 of the Commission's Rules. *See Report and Order* in re *Revised Processing of Broadcast Applications*, 72 FCC 2d 202 (1979).

34. AJB, MBCB, Abramson, and Baird have failed to provide the required Federal Aviation Administration determination as to whether their proposed antennae would constitute a hazard to air navigation. Since Bustos and New Life have, however, provided the appropriate FAA clearances for the identical site at the two heights above ground specified by all the applicants in this proceeding, we do not believe that an air hazard issue is warranted in this instance. We will require, however, that AJB, MBCB, Abramson, and Baird complete their applications by filing, within 30 days of the release of this Order, the required FAA determination as to whether the antenna tower proposed would constitute a hazard to air navigation.

**Additional Ordering Clauses**

35. IT IS FURTHER ORDERED, That the informal objection filed by MBCB IS DENIED to the extent indicated herein.

36. IT IS FURTHER ORDERED, That the petition to deny filed by MBCB IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

37. IT IS FURTHER ORDERED, That New Life republish its local notice certification in the appropriate daily newspaper pursuant to Section 73.3580(c)(1)(iii) and so inform the presiding Administrative Law Judge within 30 days of the release of this Order.

38. IT IS FURTHER ORDERED, That within 30 days of the release of this Order AJB, MBCB, Abramson, and Baird file the required FAA determination as to whether the antenna towers proposed would constitute a hazard to air navigation.

**FOOTNOTES**

[1] AJB has published proper local notice in a daily newspaper (the Merced Sun-Star) and Bustos has subsequently republished in that newspaper, thus satisfying the local notice requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-447

| | |
|---|---|
| Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Newberry, Michigan) | RM-5427 |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 10, 1986 Released: December 15, 1986**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Leon B. Van Dam ("petitioner"), seeking the allocation of FM Channel 250B1 to Newberry, Michigan, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 250B1 can be allocated to Newberry, Michigan in compliance with the minimum distance separation requirements of the Commission's Rules. Since the allotment of Channel 250B1 to Newberry is within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government is required.

3. In view of the fact that the proposed allocation could provide a second FM broadcast service to Newberry, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| Community | Present | Proposed |
| Newberry, Michigan | 228A | 228A, 250B1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before February 13, 1987, and reply comments on or before March 2, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Leon B. Van Dam
P. O. Box 152
Newberry, Michigan 49868

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend* Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments.

(See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-448**

| | |
|---|---|
| Amendment of Section 73.202(b) | RM-5410 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Centerville, Utah) | |

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 14, 1986 Released: December 15, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Mid-America Gospel Radio Network, Inc. ("petitioner"), licensee of Station KCGL(FM), Channel 288A, Centerville, Utah, requesting the substitution of Channel 289C2 for Channel 288A and modification of the license for Station KCGL(FM) to specify operation on the new channel. Petitioner submitted information in support of the proposal and states the substitution will result in a more efficient utilization of the spectrum.

2. We believe the petitioner's proposal warrants consideration. The substitution can be made in compliance with the Commission's minimum distance separation requirements.

3. In accordance with our established policy, we shall propose to modify the license of Station KCGL(FM) to specify operation on Channel 289C2. In this instance the higher class channel is considered adjacent to the current channel of operation. Therefore, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel. See *Modification of FM Broadcast Licenses To Higher Class Co - channel or Adjacent Channels* in MM Docket No. 85-313, 51 FR 20290, June 4, 1986.

4. Accordingly, in order to provide Centerville with its first wide coverage FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Centerville,Utah | 288A | 289C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before February 13, 1987 and reply comments on or before March 2, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard J. Braun, Esquire
Russell C. Balch, Esquire
Fly, Shuebruk, Gaguine, Boros and Braun
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Alloments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule* Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning the proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former plead-

ings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments ; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. *Public Inspection of* Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-449**

Amendment of Section 73.202(b), RM-5479
Table of Allotments,
FM Broadcast Stations.
(Thomaston, Maine)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 14, 1986 Released: December 15, 1986**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Donna Lee Knauer ("petitioner"), seeking the allocation of FM Channel 295B to Thomaston, Maine, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated her intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 295B can be allocated to Thomaston, Maine, in compliance with the minimum distance separation requirements of the Commission's Rules. However, the proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the rules regarding protection to the Commission's monitoring station at Belfast, Maine.

3. Since Thomaston, Maine, is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, Canadian concurrence is required.

4. In view of the fact that the proposed allocation could provide a first broadcast service to Thomaston, Maine, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| Community | Present | Proposed |
| Thomaston, Maine | — | 295 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before February 13, 1987 and reply comments on or before March 2,1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Donna Lee Knauer
175 Chestnut Street
Randolph, Massachusetts 02368

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend* Sections 73.202(b), 73.504 and 73.606(b) of *the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief , Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.
Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-450**

| | |
|---|---|
| Amendment of Section 73.202(b) | |
| Table of Allotments, | RM-5382 |
| FM Broadcast Stations. | |
| (Monticello and Logansport | |
| Indiana) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 14, 1986 Released: December 15, 1986**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Edward A. Holderly ("petitioner") requesting the allocation of FM Channel 299A to Monticello, Indiana as that community's second FM channel. Petitioner has expressed an intention to apply for the channel, if allotted. The channel can be allocated in compliance with the Commission's minimum distance separation requirements.

2. Channel 237A, now allocated to Logansport, Indiana is actually used at Monticello, Indiana. Therefore, we shall also propose herein to reallocate FM Channel 237A to Monticello, Indiana to reflect its actual use there.

3. In view of the fact that the proposed allotment could provide a second FM channel to Monticello, Indiana, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with respect to the following communities:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Logansport, Indiana | 237A, 272A | 272A |
| Monticello, Indiana | --- | 237A, 299A |

4. The Secretary of the Commission SHALL SEND by CERTIFIED RETURN RECEIPT REQUESTED, a copy of this *Notice* to the licensee of WKJM (Channel 237A), Logansport, Indiana at the following address: Nu-View Associates, Inc., Station WKJM, Route 1, Box 70, Remington, Indiana 47977.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before February 13,1987, and reply comments on or before March 2, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mr. Edward A. Holderly
R.R. #2, Box 404
Monticello, Indiana 47960
(petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to *Amend* Sections 73.202(b), 73.504 and 73.606(b) of *the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-451**

| | |
|---|---|
| Amendment of Section 73.202(b), | |
| Table of Allotments, | RM-5461 |
| FM Broadcast Stations. | |
| (Taft, Oklahoma) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 14, 1986 Released: December 15, 1986**

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by Tareeca J. McKee ("petitioner") requesting the allocation of Channel 262A to Taft, Oklahoma, as the community's first local FM service. Petitioner states that she will apply for the channel, if allocated. Channel 262A can be allocated in compliance with the Commission's mileage separation requirements with site restriction of 5.1 kilometers (3.2 miles) southwest to avoid a short-spacing to Station KWGS, Channel 208C1, Tulsa, Oklahoma, and to Station KTCS-FM, Channel 260, Fort Smith, Arkansas.

2. We believe the public interest would be served by seeking comments on the allocation of a first local FM service at Taft. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Taft, Oklahoma | — | 262A |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

4. Interested parties may file comments on or before February 13,1987, and reply comments on or before March 2, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Tareeca J. McKee
P.O. Box 1329
Muskogee, Oklahoma 74402

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend* Sections 73.202(b), 73.504 and 73.606(b) of *the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex pane* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-468**

In re Applications of

LEONARD JAMES GIACONE
(hereafter "Giacone") File No. BPH-860116MI
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 100 meters

MINORITY
BROADCASTING
CORPORATION File No. BPH-860122MK
(hereafter "Minority")
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 100 meters

Gordon L. Bostic *et. al.*, d/b/a
BOSTIC
BROADCASTING File No. BPH-860123MY
(hereafter "Bostic")
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 100 meters

RADIO
LAUREL, LTD. File No. BPH-860123MZ
(hereafter "RLL")
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 84 meters

DOROTHY SUE SMITH
(hereafter "Smith") File No. BPH-860123ND
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 100 meters

FM LAUREL, INC. File No. BPH-860123NE
(hereafter "FMLI")
Laurel, Mississippi
Req: 98.1 MHz, Channel 251A
3 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

**HEARING DESIGNATION ORDER**

**Adopted: December 4, 1986 Released: December 15, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Bostic*. Although Kenneth H. Larkin, Jr. represented Bostic as its Technical Consultant, he failed to provide his signature as required on pages 13 (Section V-B) and 18 (Section V-G) of FCC Form 301. Accordingly, Bostic will be required to submit the amended signature pages to the above-noted engineering sections of its application to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *RLL*. RLL has described its organizational structure as a limited partnership with one general partner (Lula Cooley) controlling 20% interest and two limited partners each holding 40% interest. The Commission's policy is that the involvement of a limited partner in the management structure of the station will not exempt that partner's broadcast interests for attribution purposes in the comparative phase of the proceeding. *Report and Order* in MM Docket 83-46, 97 FCC 2d 997 (1984), *modified on reconsideration* 50 Fed. Reg. 27438 (1985). Accordingly, RLL will be required to submit, if appropriate, a statement to the presiding Administrative Law Judge within 30 days of the release of this Order that its limited partners will be sufficiently insulated from the management and operation of the media-related activities of the applicant.

4. *Other Matters*. RLL has petitioned for leave to amend its application on April 21 and June 23, 1986; FMLI has similarly petitioned for leave to amend its application on September 5, 1986. The accompanying amendments were filed after March 7, 1986, the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by all of the applicants in this proceeding would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Giacone, Minority, Bostic, RLL, Smith and FMLI would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Bostic shall file an amended signature page for Sections V-B and V-G with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That RLL shall file, if appropriate, a statement certifying that its limited partners will be sufficiently insulated from the management and operation of the media-related activities of the applicant.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RLL and FMLI ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM DOCKET NO. 85-94**

In re Applications of

PENTECOSTAL
REVIVAL
ASSOCIATION,
INCORPORATED File No. BPCT-841015KN

PALATKA
TELEVISION, INC. File No. BPCT-841129LK

For Construction Permit
for a New Television Station
Palatka, Florida

**ERRATUM**

**Released: December 15, 1986**

Our Decision, FCC 86R-75, released November 26, 1986, contained the following substantial reproduction errors which will be corrected when the slip opinion is included in the FCC Record:

Para. 3, line seven after the word "superficial" add: showing made by Pentecostal in this case, we affirm the ALJ's finding that,

Para. 4, line two correct "that appeal" to "this appeal"

Para. 4, line eleven after "Ginn, Jr." add: and Stephen H. Cone (Br. 6). We are told that: "This is an applicant which

Para. 4, line nineteen correct "operation profit" to "operating profit"

Para. 4, line twenty after the word "assets." add: (i) PTI cannot be dissolved, liquidated, abandoned, consolidated, merged, or

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

Giraud Chester &
Marjorie F. Chester
d/b/a CHESTER
ASSOCIATES — MM DOCKET NO. 84-525
East Hampton, New York — File No. BPH-830318AC

JOHN F. SHEA, III — MM DOCKET NO. 84-526
East Hampton, New York — File No. BPH-830321AL

For Construction Permit
for a New FM Station

**Appearances**

*Jerome S. Silber* and *Jerome S. Boros* on behalf of Chester Associates; and *Thomas L. Siebert* on behalf of *John F. Shea.*

**SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER**

**Issued: December 11, 1986; Released: December 16, 1986**

**Preliminary Statement**

1. Two mutually-exclusive applicants remain: Giraud Chester and Marjorie F. Chester d/b/a Chester Associates (Associates), and John F. Shea, III (Shea). Each would operate a new FM station on 96.7 MHz, Channel 244A, at East Hampton, New York. The only issue that needs to be resolved is the standard comparative issue. See 49 F.R. 23451, Issue 1, published June 6, 1984.

2. We held the original prehearing conference on October 2, 1984, and the hearings on November 6 and 8, 1984. After the hearings were concluded, and Findings and Reply Findings had been filed, the Presiding Officer released his Initial Decision. See FCC 85D-9, released February 5, 1985. There he concluded that Associates was the superior comparative applicant, granted its application, and denied Shea's.

3. Shea took his exceptions, and the Review Board held oral argument on July 12, 1985. However, shortly thereafter, the Board placed the case "in abeyance" (FCC 85R-71 released August 28, 1985). In so doing it called for Commission guidance on the question of vicarious integration credit as between spouses, guidance that it believed would be forthcoming when the Commission reacted to the Court of Appeals' remand in *Ventura Broadcasting Co. v. FCC*, 765 F. 2d 184 (D.C. Cir. 1985). [1]

4. Such guidance never came. [2] See *Absolutely Gre Radio, Inc.*, 60 RR 2d 355, released May 16, 1986. Inste the Commission chided the Board for deferring action i this case. At paragraph 11 of its Decision, the Commi sion said this:

> "...It is not in the public interest to extend proceedings [3] – and thereby delay new broadcast services – to delve into attribution questions and..."

5. So, on May 29, 1986, the Board called on the tw applicants to address "...the impact that *Absolutely Gre Radio, Inc.*, FCC 86-250 ... has on this proceeding." 4 Se FCC 86R-35. The two applicants submitted their com ments. It was then the Board remanded the proceedin for further hearing. See FCC 86R-48, released August 1 1986.

6. In its remand order, and despite the Commission's previous admonition (para. 4 *supra.)*, the Board said thi "We have determined that the more conservative cours here would be to assume *arguendo*, that the Commissio may have overlooked our abeyance order in this case..." "Accordingly," it said, "we will not presume that suc [husband and wife] ownership structures are excluded fo attributed 'integration purposes.'" Thus, the Board calle for a further evidentiary hearing "...to determine whethe Chester Associates' purported 'limited partner' spouse ha been, and will likely be, 'passive' so as to attribute hi 35% equity interest to his wife's 'integration' factor."

7. Discovery was had on the remanded question (FC 86M-2483, released August 6, 1986). On September 1 1986, Shea deposed both Marjorie Chester (Associates Ex 13), and Giraud Chester (Associates Ex. 12). [5] Associate exchanged its two remand exhibits on October 14, 1986 and a brief remand hearing was held on October 27 1986. [6] Shea filed its Supplemental Proposed Findings o Fact and Conclusions of Law on November 26, 1986, and Associates filed theirs on November 28, 1986. Both file their Supplemental Replies on December 10, 1986.

**Findings of Fact** [7]

**Description of the Applicants**

8. *Giraud Chester & Marjorie Chester d/b/a Chester Associates. Associates is a limited partnership organized under the laws of New York State.* [8] Marjorie Chester, the sole general partner, owns 65% of the Partnership equity. Her husband, Giraud Chester, is the sole limited partner and owns the remaining 35% of the equity.

9. *John F. Shea.* Shea is prosecuting BPH-830321AL as a sole proprietor. He is the 100% owner.

**Diversification of Mass Media**

10. Neither Associates nor Shea hold any cognizable media interests. [9]

**Auxiliary Power**

11. Both Chester and Shea propose auxiliary power-generating equipment at their studio and transmitter sites.

**Integration of Ownership With Management**

12. *John F. Shea, III.* Shea claims 100% full-time quantitative integration. As an individual applicant Shea intends to devote a minimum of 40 hours per week to being General Manager of the station. In that role, he will make the primary and ultimate day-to-day operating decisions, decisions that will effect day-to-day news, public affairs, entertainment and non-entertainment programming. Shea will define and implement station policy, hire and fire both the administrative and managerial staff, purchase equipment and services, and implement the equal opportunity program. [10] Shea has resided in East Hampton for about three years. [11]

13. John Shea is a practicing lawyer. He was admitted to the New York State Bar in March of 1973. He practiced in New York State before moving to Washington, D.C. in the summer of 1979. He practiced in Washington, D.C. as counsel to the Council on Environmental Quality in the Executive Office of the President before moving to East Hampton. He is presently a partner in the law firm of Twomey, Lathan and Shea.

14. Since moving to East Hampton, Shea has become civically active (See Footnote 11). He has been counsel for the East Hampton Village Preservation Society from June 1982 to the present; he has been counsel for the East Hampton Citizen's Planning Committee from March 1982 to the present; he has been a member of and counsel to the East Hampton Town Democratic Committee from September 1982 to the present; and he is a member of County Democratic Committee during the same time period.

15. Mr. Shea never has been in broadcasting, never has worked at or even visited a broadcast station, and never has taken a broadcast management course (Tr. 209-210).

16. Since he is a white, non-Hispanic male, Shea cannot claim a qualitative integration enhancement.

17. *Chester Associates.* Chester claims 100% quantitative integration credit. It intends to fully integrate its 65% sole General Partner *Marjorie Chester* into the proposed station's day-to-day operations. Mrs. Chester will work a minimum of 40 hours a week as General Manager of the station. As General Manager, she will supervise the station's operations. She will oversee construction and regulatory compliance, hire and supervise the staff, develop programming concepts, and deal with advertising representatives. She has resided in East Hampton Village for the past eight years.

18. After graduating from high school Marjorie Chester attended Smith College, and graduated from Barnard College with a BA in 1954. While she was at Smith she participated in the college's radio station operation; she produced a one hour classical music program.

19. Mrs. Chester is a professional writer. From 1955 to 1959 she was an assistant and associate editor for *Good Housekeeping Magazine.* Then from 1959-1962 she was an associate editor of *McCall's Magazine.* She wrote articles for *McCall's* under her own name as well as under a variety of pseudonyms. She also wrote a full-length book entitled *"McCall's Book of Fund Raising Ideas."* It was published by Prentice-Hall.

20. She dropped out of the job market to raise two children (who are now 19 and 21 years old). During that time period she attended Hunter College for two years and Columbia University for an additional three years to study the Chinese language. In 1978 she taught English to Chinese-speaking people at the Church of the Transfiguration in New York City.

21. Mrs. Chester has resumed professional writing on a free-lance basis; she has had several feature articles published in *The New York Times,* and has contributed a number of articles to the *East Hampton Star.*

22. She has had some broadcast experience. In the autumn of 1983, she studied radio station management at Hunter College. In the 1970s, she aired some public service announcements over WMCA, New York City, and in 1984, she studied various station operations at Station WRCN-FM, Riverhead, New York. But she has had no broadcast management experience.

23. Mrs. Chester has been civically active in East Hampton. She has been a member of the Ladies Village Improvement Society in East Hampton since 1970 and Chairperson of the Flag Committee since 1978. Since the 1970s, she has been an active member of and a donor to Guild Hall, East Hampton's cultural center, and a member of the East Hampton Historical Society, a Society devoted to preserving East Hampton's historical sites. Mrs. Chester is also a donor to the East Hampton Free Library.

24. Marjorie Chester claims qualitative integration enhancement because she is a female.

25. *The Remanded "passivity" Question.* Associates filed its FM application on March 18, 1983. It was a general partnership made up of two partners: Marjorie F. Chester was the controlling general partner and held a 65% equity interest; her husband, Giraud Chester, was the minority general partner and held the remaining 35% interest.

26. The controlling partner, Marjorie Chester, assumed the primary responsibility for managing the proposed station. Since she no longer had any significant child-rearing duties (See Finding 20 *supra.),* she wanted to reestablish a professional career on a full-time basis. So Associates proposed that she would spend at least 40 hours a week managing the day-to-day affairs of the new station.

27. She did, in fact, assume primary financial responsibility for prosecuting the application. Mrs. Chester has independent financial resources derived from her father, a founder of Grey Advertising. She has always maintained a separate bank account from her husband; they have never had a joint bank account. She drew upon her independent bank account to pay 65% of the general partnership's debts.

28. At that time (between March and July 1983) Associates contemplated involving Giraud Chester in station affairs on a limited basis. So even though he was and had been Executive Vice-President of Goodson-Todman thus possessing a substantial amount of broadcast experience, he took only 35% equity, and was to work at the station only 20 hours a week. At that moment business at Goodson-Todman was unusually slow, and Giraud Chester had considered either retiring from the firm or substantially decreasing his responsibilities there. Thus he firmly believed he could fulfill his 20-hour a week pledge.

29. Between March and July 1983 both general partners were involved in prosecuting Associates' application although Marjorie Chester (65%) played the major role. She reviewed and signed the application. Giraud Chester (35%) signed two amendments that contained information

relating to him personally; i.e., regarding his diversification status. The two partners jointly instructed counsel to exercise his professional judgment in moving Associates' application forward.

30. However, at the end of July 1983, Goodson-Todman's business fortunes changed abruptly. Unforeseen and substantial demands were suddenly placed on Giraud Chester's time and energies. Two television networks contracted with Goodson-Todman for two new television programs. Giraud Chester was assigned the task of creating a new television series. During August and September 1983, he worked at a hurried pace, and had to spend a great deal of time in California. Mr. Chester's work schedule has continued at a strenuous level since that time.

31. In any event he soon realized that he would no longer be able to devote any time to the East Hampton radio station. He told Marjorie Chester that he would be too busy to either help prosecute or help operate Associates' proposal. He suggested that Associates withdraw its application unless Marjorie Chester was willing not only to accept sole responsibility for prosecuting the application, but also to accept sole responsibility for operating the station if and when it is granted. Since her primary motive was developing a satisfying career, Marjorie Chester decided to proceed with the application.

32. When they conveyed this decision to Associates' counsel, he suggested that the partnership structure be changed from a general partnership to a limited partnership to reflect the contemplated changes in management responsibility. They agreed with that suggestion, and on October 3, 1983, Associates timely amended its partnership structure.

33. Marjorie Chester (the 65% general partner) has continued to prosecute Associates' application. When Associates needed a new site, it was Marjorie Chester who personally searched for and located an appropriate site. It was she who decided to buy that site; she authorized an engineer to produce a technical report on that site; and she personally paid for the report from her own funds. She fully understands the responsibilities she must undertake as general manager of the new station.

34. On the other hand, since July 1983, Giraud Chester (the 35% limited partner) has devoted all of his professional time and energy to his Goodson-Todman duties. His role at Associates has been and will remain that of a passive investor. Mr. Chester has worked at Goodson-Todman for about 20 years, he finds the work rewarding. Mr. Chester understands full well the limitations placed on his 35% limited partnership interest. He has invested his own money in broadcast limited partnerships previously, and he has neither tried to transform those interests into employment nor tried to exert influence over the broadcast operations.

35. Marjorie Chester, the sole general partner, doesn't intend to hire Giraud Chester to work for Associates; she doesn't intend to allow him to perform any service for Associates "materially related to its media activities;" and she doesn't intend to authorize *any* contract between Giraud Chester and Associates.

36. On his part Giraud Chester doesn't intend to become an Associates' employee; he isn't now and doesn't intend to become an independent contractor performing services or supplying goods to Associates; and he doesn't now and doesn't intend to perform any services for Associates "materially related to its media activities." He doesn't discuss Associates' day-to-day operations with Marjorie Chester, and doesn't intend to do so in the future.

37. Both Marjorie and Giraud Chester realize that Marjorie Chester has unbridled legal authority to make all of Associates' management decisions; that she alone is personally liable for Associates' debts; that Giraud Chester's liability is limited to the amount of his contributions; that he doesn't have the power to relieve Marjorie Chester as the general partner; and that he has no power to appoint new or additional general partners.

**Ultimate Findings and Intermediate Conclusions**

1. The two remaining mutually-exclusive applicants for Channel 244A at East Hampton are Chester Associates (Associates) and John F. Shea, III (Shea). In deciding which one should be granted, we must direct our analysis toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public. We will analyze those two objectives pursuant to the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 as modified by subsequent Review Board and Commission decisions.

2. *Quantitative Integration.* Since neither applicant holds any cognizable media interests, and since both propose auxiliary power-generating equipment at their studio and transmitter sites, this case will turn on their integration proposals. But before we can compare those proposals we must first address the question posed by the Review Board's remand. Briefly stated that question is this: Is Associates entitled to 100% *quantitative* integration credit or is it only entitled to 65% credit; i.e., for Marjorie Chester's 65% general partnership interest only? For if Associates is entitled to only 65% quantitative credit, Shea (with his 100% integration) will obviously prevail. On the other hand, if Associates' is entitled to 100% *quantitative* integration, we must then analyze the qualitative integration attributes that each possesses to determine the winner.

3. In analyzing Associates' quantitative integration problem, we must first address what the problem isn't. This approach is mandated by the background findings (Findings 3-7 *supra.).* The matter isn't nearly as complicated as those findings seem to indicate it is. First of all this is not an *Absolutely-Great* joint-tenancy question, and never has been. Associates is not a joint-tenancy, and it doesn't seek to have Giraud Chester's interest attributed to Marjorie Chester on the basis of their marriage. See Associates Ex. 12, and Tr. 444-445.

4. Secondly, this is not a "sham" limited partnership problem. That is, this is not one of those limited partnerships that the Review Board faced in *KIST Corporation*, 57 RR 2d 49 (Rev. Bd. 1984) *affirmed in part, reversed in part,* 58 RR 2d 1483, [12] or in *Houston Family Television Ltd.*, 58 RR 2d 1557 (Rev. Bd. 1985). The record shows that the limited partnership formed by Marjorie and Giraud Chester is a *bona fide* arrangement between two financially independent, and propertied persons. They formed that limited partnership for a legitimate business reason. Their amendment was timely filed and accepted. There has never been the slightest evidentiary indication that a "sham" or "con" job is being perpetrated. From the

outset, Marjorie Chester, the sole general partner and 65% owner, has assumed the dominant role in prosecuting Associates' application; she has made the operational decisions; she has performed effectively. Stated another way, she has acted like the controlling owner she is.

5. On the other hand, and from the outset, Giraud Chester has acted like the 35% owner he is. When Associates was a general partnership, he played a secondary role. When Associates became a limited partnership in October 1983: he became, he remains, and he intends to remain a passive investor. He has not and will not materially involve himself in the management or operation of the proposed station. No "sham," no "con."

6. Since no joint-tenancy question is present, and since no KIST "sham" is involved, then what Commission policy does apply? *Anax Broadcasting, Inc.*, 49 RR 2d 1589 (1981) governs. There the Commission held that when "...limited partners are passive investors and have no authority to control the licensee, their integration or lack of integration is inconsequential..." "Thus," the Commission said, "transfer of their interests to the general partner does not affect control of the partnership." [13] When the *Anax* doctrine is applied to the facts here (Findings 25-37 *supra.)*, Giraud Chester's 35% limited partnership interest is exempt from the integration calculus, and Associates is entitled to 100% quantitative credit.

7. *Qualitative Integration.* It is concluded that both Shea and Associates are entitled to 100% *quantitative integration*. We turn then to the qualitative attributes that each will bring to bear on their proposal. However, and because a penumbra of uncertainty surrounds the awarding of minority and female enhancements, we will first analyze the qualitative integration factor without any reference to such enhancements.

8. Associates is entitled to a substantial preference over Shea on the *local residence* criterion. Marjorie Chester has resided in East Hampton twice as long as John Shea (Compare Findings 12 and 17 *supra.)*. This much longer term of residence shows up again when we analyze the *civic participation* of the two principals. Mrs. Chester is again entitled to a substantial preference. Not only has she shown civic concern for East Hampton for many years, her civic activities are more diversified, Shea's being principally extensions of his role as a practicing attorney (Compare Findings 14 and 23 *supra.)*.

9. Both have commendable business and professional backgrounds. Shea is a trial attorney. He has practiced in both New York and Washington, D.C. Mrs. Chester is a professional writer. They both appear perfectly capable of managing a broadcast operation (Compare Findings 13 with Findings 18-21 *supra.)*. However, Mrs. Chester is entitled to a slight preference for *broadcast experience*. She hasn't had much. But Shea hasn't had any (Compare Findings 15 and 22 *supra.)*.

10. So based on the foregoing (Conclusions 8-9 *supra.)*, and without in any way denigrating Shea's comparative credentials, it is clear that Associates is comparatively superior. So even before we look at minority and female enhancements the conclusion is warranted that Chester Associates will offer the best practicable service to the East Hampton public, and its application should be granted.

11. Turning then to the enhancement area, we see that an enhancement analysis would only strengthen Associates' comparative position. Marjorie Chester would be entitled to a qualitative female enhancement for being a female. Since he is a white, non-Hispanic male, Shea cannot claim a qualitative integration enhancement. Thus either way, with and without qualitative integration enhancements, Chester Associates is the comparative winner.

SO, unless an appeal is taken from this Supplemental Initial Decision or the Commission reviews it on its own motion, the application of Giraud Chester & Marjorie F. Chester d/b/a Chester Associates (BPH-830318AC) IS GRANTED; and

John F. Shea, III's application (BPH-830321AL) IS DENIED. [14]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

**FOOTNOTES**

[1] On the administrative level Ventura is known as the *Absolutely Great Radio, Inc.* proceeding or *Absolutely Great II.*

[2] Why the Review Board even anticipated such guidance isn't clear. The questions presented in the two cases are entirely different. *Ventura* involved a husband-wife joint tenancy question; this case poses a question whether a husband-wife limited partnership is *bona fides* or not. They are two separate questions. See Board member Jacobs' concurring statement at FCC 86R-35, released May 29, 1986.

[3] *Cf. Horne Industries, Inc.*, 53 RR 2d 1647 (1983).

[4] Note that the Board didn't call for comments "...addressing what impact, if any, that *Absolutely Great Radio, Inc.*, FCC 86-250 ... has on this proceeding." Rather the Board's May 29th Order (except for Board member Jacobs' statement - see Fn. 2 *supra.)* appears to prejudge the very "impact" it purportedly asked the parties to address. For example, at para. 2 of its Order the Board said, "...our reading of that new decision would seem to indicate that Mrs. Chester (65% equity interest) may not in this case be awarded vicarious 'integration' credit on the basis of her husband's ownership of the remaining 35% equity interest in Chester Associates..." Doubtless, it was such language that led Associates to file an "Application for Review" with the Commission on September 3, 1986. There Associates characterized the Board's remand order, *infra* as "a remand without a function."

[5] Mrs. Chester also testified at some length at the first hearing about her husband's limited partner "passivity." See Tr. Vol. 2, November 6, 1984 at pp. 30-95.

[6] Since both applicants were willing to rely on Shea's September 11, 1986 depositions, the entire remanded hearing lasted less than an hour. See Tr. Vol. 5.

[7] The Presiding Officer has taken the relevant findings from the Initial Decision, FCC 85D-9 *supra.*, renumbered them, in some instances reworded them, and placed them in the appropriate place in this Supplemental Decision. Stated another way, except for background purposes, no cross-referencing between this Decision and FCC 85D-9 is required.

[8] Chester's counsel was alerted to the fact that the Commission's Processing Lines have been receiving both ersatz as well as legitimate limited partnership applications (Tr. 16-17). Consequently, and prior to hearing (Tr. 81), he made a copy of Chester's Certificate of Limited Partnership available to his opponents. A review of that Certificate along with the testimony adduced at the hearing clearly shows that Associates is a legitimate limited partnership. See EHB Ex. 4, Tr. 81-82, and *infra*.

[9] Giraud Chester, Associates' limited partner, holds a 2.6% limited partnership interest in the licensee of UHF Television Station WPMT (TV), York, Pennsylvania.

[10] Chester Associates has attacked John Shea's 40-hour a week integration pledge claiming that, as a practicing attorney, Shea can't maintain his professional legal responsibilities and also meet his 40-hour a week commitment. Those attacks are rejected (Tr. 122-149).

[11] Prior to relocating in East Hampton, Shea resided in Washington, D.C. In June 1981 he learned that FM Channel 244A was to be allocated to East Hampton. This was one of the factors that caused him to relocate in East Hampton (Tr. 188-190). Thus it could be argued that Shea started participating in local civic activities with this hearing in mind. Shea didn't file his application until March 21, 1983. Nevertheless Shea will be credited with his local East Hampton activities since they are the type of political activities an attorney would participate in even if he wasn't applying for an FM channel.

[12] In fact the *bona fides* of Associates' limited partnership is far less suspect than the one the Commission cleared in the *KIST* proceeding; i.e., Sunland Communications Co.'s limited partnership. See 58 RR 2d 1483 at paras. 3-6.

[13] Obviously the Presiding Officer wasn't a disciple of the Commission's *Anax* fiction. See 49 RR 2d 1580 (1981) *supra*. at para. 1 *et seq*. Limited partners already get tax advantages and only have limited liability. Giving them additional quantitative integration credit seems overly-indulgent. But that is the law. It is Commission policy, and it must be applied in appropriate circumstances. This is such a circumstance.

[14] If exceptions aren't filed within 30 days or the Commission doesn't review the case on its own motion, this Supplemental Initial Decision will be become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 24, 1986*

U S WEST OPERATING COMPANIES'

PUBLIC PACKET SWITCHING NETWORK TARIFF, PROTOCOL CONVERSION COMPLIANCE FILING, AND MARKETING WAIVER REQUEST PLEADING CYCLE ESTABLISHED

On November 18, 1986, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (the U S West Operating Companies) filed a tariff to offer Public Packet Switching Network (PPSN) service. In conjunction with this filing the U S West Operating Companies also submitted a plan for compliance with the *Protocol Waiver Order* and a petition for waiver of the Computer II rules to market protocol conversion with basic packet switching service.

Persons wishing to submit petitions against the tariff or comments on the compliance filing and the marketing waiver request should do so by December 9, 1986. Reply comments may be filed by December 19, 1986. Comments should be divided into two separate sets of pleadings: (1) petitions against the tariff or comments concerning the collocation conditions, e.g., interoffice channels, NURE, and equal access, of the *Protocol Waiver Order* should be designated Mountain Bell, Northwestern Bell, Pacific Northwest Bell, Tariff F.C.C. No. 1, Transmittal No. 30; and (2) comments dealing with the accounting plan and marketing waiver petition should refer to AAD 6-1552.

Parties are requested to serve copies of their petitions or comments upon International Transcription Service at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the tariff, compliance plan and marketing waiver may be obtained from International Transcription Service, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., or Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information on the tariff and collocation conditions, contact Kurt DeSoto at (202) 632-6917. For further information on the accounting plan and marketing waiver petition, contact Gene Dougherty at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Record.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

AAT COMMUNICATIONS CORPORATION — File Nos. 154-CDM-P-86, 155-CDM-P-86, 163-CDM-P-86

For Authority to Construct and Operate a Limited Network in the Digital Electronic Message Service

**MEMORANDUM OPINION AND ORDER**

**Adopted November 18, 1986 Released December 16, 1986**

By the Common Carrier Bureau:

1. The Common Carrier Bureau has before it the application of AAT Communications Corporation (hereinafter Applicant) for authorization to construct a limited network in the Digital Electronic Message Service (DEMS). The initial phase of the network will consist of constructing two digital termination system (DTS) nodal stations to serve the New Brunswick, New Jersey and New York, New York Standard Metropolitan Statistical Areas (SMSA). The DTS applications are not mutually exclusive with any pending applications and there have been no oppositions filed.

2. The Bureau has reviewed the applications. Applicant shall be required to provide just, reasonable, and non-discriminatory service under Title II of the Communications Act. Further, Applicant shall be required to make substantial progress in the construction of its DTS over the period granted for construction in accordance with Section 21.43(c) of the Commission's Rules, 47 C.F.R. § 21.43(c), and with its contruction schedule. In all other respects, we FIND under the standards of Section 214 and Title III of the Communications Act, that the Applicant is legally, financially, technically, and otherwise qualified to construct the facilities for which it has applied.

3. Accordingly, IT IS ORDERED that the system application of the Applicant is hereby GRANTED, and construction permits, file numbers 154-CDM-P-86 (call sign WLA291), 155-CDM-P-86 (call sign WLA312), and 156-CDM-P-86 (call sign WLA313) are hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 26, 1986*

## COMMON CARRIER BUREAU DEFERS NATIONAL EXCHANGE CARRIER ASSOCIATION'S PROPOSED TEMPORARY INCREASE IN CARRIER COMMON LINE RATES

On November 26, 1986, the Common Carrier Bureau deferred the National Exchange Carrier Association's revisions to Tariff F.C.C. No. 1, submitted under Transmittal Nos. 179 and 180, November 14 and 18, 1986, respectively, which proposed to increase the existing Carrier Common Line Premium and Non-Premium Originating Access Services rates through the end of 1986.

As the letter attached to this Notice indicates, the revisions which were scheduled to become effective on November 29, 1986 were deferred to January 1, 1987. The Bureau indicated that additional time was needed to address the factual, legal, and equitable issues presented by the filing and the petitions addressing it.

For further information, contact:
Carolyn J. Veal, (202) 632-6917

FEDERAL COMMUNICATIONS COMMISSION

* Note: This item, although pubicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 17, 1986*

## NATIONAL EXCHANGE CARRIER ASSOCIATION REQUESTS PERMISSION TO PROPOSE A TEMPORARY INCREASE IN CARRIER COMMON LINE RATES; BUREAU GRANTS PERMISSION SUBJECT TO CONDITIONS AND SETS PLEADING CYCLE

On November 13, 1986, the National Exchange Carrier Association (NECA) filed an application with the Commission for special permission to file an increase in the Carrier Common Line (CCL) rates to be effective through the end of this year. Its application stated that "[t]his filing is being made to offset the shortfall in earnings for NECA's Carrier Common Line pool members resulting from actual demand volumes failing short of what was anticipated in the Midyear 1986 filing." The proposal would increase the originating premium CCL rate from the current 3.04 cents per minute to 4.33 cents.

As the letter attached to this Notice indicates, the Common Carrier Bureau granted NECA's application in part and subject to certain conditions, in order to permit consideration of the legal and equitable considerations presented by the request. NECA submitted the proposed revision under Transmittal No. 179 on November 14 to be effective November 29, 1986. In this Notice, the Common Carrier Bureau is establishing the following pleading cycle and requirements with respect to this transmittal.

As indicated in the letter, NECA was required to serve its transmittal and support information personally so far as possible and in no event later than by overnight mail upon all petitioners in the pending proceeding involving access tariff revisions scheduled to become effective January 1, 1987. Petitions and comments regarding the transmittal must be filed with the Secretary's Office no later than November 21, 1986 and must also be served on that date personally so far as possible upon NECA's counsel in Washington, or by overnight mail. A copy must also be served upon the Commission's contract copier, International Transcription Service (ITS), Room 246, 1919 M Street, N.W. NECA's reply must be filed no later than November 25, 1986 and must be served upon all petitioners and upon ITS.

For further information, contact:

Diane Shaw (202) 632-6917

FEDERAL COMMUNICATIONS COMMISSION

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Commission Record.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

DAMA
TELECOMMUNICATIONS
CORP. File No. 952-CDM-P-84

To Construct a Digital Termination
System in the Jersey City, NJ SMSA

## MEMORANDUM OPINION AND ORDER

**Adopted: December 1, 1986; Released: December 16, 1986**

By the Common Carrier Bureau:

1. The Bureau has before it an application filed by Dama Telecommunications Corp. (Dama), an extended network applicant in the Digital Electronic Message Service (DEMS), to construct a digital termination system (DTS) in the Jersey City, NJ SMSA on channel 34 in the 18 GHz band.

2. Dama's initial DTS application in this SMSA specified channel 31. New Jersey Bell Telephone Co. (NJ Bell) and First Communications Group, Inc. (FCG) petitioned to deny Dama's application on the grounds that it was cut-off by their previously-filed co-channel applications in adjacent SMSAs. Dama subsequently amended its application to channel 34; thus, NJ Bell's and FCG's petitions were rendered moot.

3. BTV Digital Services (BTV) has filed a petition to dismiss Dama's application for channel 34. The petitioner argues that Dama's application is mutually exclusive with BTV's co-channel applications in the Newark, NJ and New York, NY SMSAs (File Nos. 192 and 174-CDM-P-84) because Dama, which had not filed an interference analysis pursuant to 47 C.F.R. § 21.504, had not shown non-interference between the proposed stations. Because Dama's application was filed more than 60 days after public notice that BTV's applications were accepted for filing, BTV asserts that Dama's application should be dismissed pursuant to 47 C.F.R. § 21.31(b).

4. By letter dated July 10, 1986 the Bureau requested Dama to file an interference analysis for its Jersey City application. Dama filed an interference analysis on August 14, 1986 to demonstrate that its proposed station would not cause harmful electrical interference to BTV's proposed stations or to a previously-proposed station of New England Digital Distribution, Inc. (NEDD) (File No. 808-CDM-P-84). The analysis also described techniques to be used to resolve any potential interference problems. Neither BTV nor NEDD, which were served copies of Dama's analysis, have filed objections to the proposal.[1] Consequently, we find that Dama's application is not mutually exclusive with any previously-filed co-channel application and is not subject to dismissal under 47 C.F.R. § 21.31.

5. In conclusion, we find that Dama's application is in accordance with the Commission's rules and regulations and that grant of this application will serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED that NJ Bell's and FCG's petitions are DISMISSED AS MOOT and that BTV's petition is DENIED.

7. IT IS FURTHER ORDERED that Dama's application, File No. 952-CDM-P-84, is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

### FOOTNOTES

[1] On August 20, 1984 Dama filed an analysis to show non-interference to four co-channel licensees in adjacent SMSAs. No oppositions to Dama's proposal have been filed by those existing users, which were served copies of the analysis.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Routine Licensing of Large Networks
of Small Antenna Earth Stations
Operating in the 12/14 GHz Frequency
Bands

**ORDER**

**Adopted: December 8, 1986 Released December 16, 1986**

By the Chief, Common Carrier Bureau:

1. In our *Blanket Licensing Order*,[1] the Bureau established a procedure for granting blanket authorizations for satellite networks using large numbers of identical, small transmit/receive earth stations to be operated in the 12/14 GHz frequency bands. It also provided for routine, streamlined review of applications for these networks where their technical characteristics come within certain established parameters.[2] Under consideration here is a Petition for Partial Reconsideration and Clarification filed by Federal Express Corporation (Federal Express) of the Common Carrier Bureau's order in the above-captioned matter. After expressing general support for the Bureau's actions, Federal Express raises three specific points on which it desires clarification.[3]

2. Specifically, Federal Express requests clarification of the following three issues: (1) will the Commission grant blanket authorizations for satellite networks which do not comply with the exact terms of the order; (2) will the Commission allow interference calculation techniques other than that specified in Appendix C to *Licensing of Space Stations in the Domestic Fixed Satellite Service*, 54 Rad. Reg. 2d 577 (1983) (*Reduced Spacing* ) [Appendix C]; and (3) will the parameters set forth in the declaratory order be subject to modification in response to technological changes. The petition is granted to the extent discussed herein.

3. Traditionally, one of the primary attributes of our domestic fixed-satellite licensing program has been its flexibility and its adaptability to a rapidly changing technological environment. The general thrust of Federal Express's petition is that we continue to extend this flexibility to our blanket licensing procedures for large networks of earth stations. This approach reflects an inherent aspect of our licensing policies for small antennas such as the type considered here.[4]

4. The Bureau's order in *Blanket Licensing* reflects these policies by simply establishing conditions under which certain types of small antennas operating in the 12/14 GHz frequency bands would be routinely licensed for specified types of transmissions. This procedure would eliminate the need for the submission of an individual, detailed inter-satellite interference analysis with each application. The licensing parameters on which the order was based were derived from the particular applications under consideration at the time and Federal Express does not suggest any specific modification of those standards in its petition.

5. The Commission would, of course, accept and consider on their merits applications for satellite networks which do not specifically conform to *Blanket Licensing* because of different service requirements or general technological changes. Commission review could be applied to specific proposals on a case-by-case basis in response to a particular application or, alternatively, the Commission could choose to address the general parameters set out in paragraph 10 of the order in response to a concrete proposal for modification.[5] However, any changes must be based on a finding that licensing nonconforming networks will continue to assure the absence of unacceptable interference under conditions of uniform 2° spacings. In addition, in response to Federal Express's request for consideration of alternative interference calculation techniques, while methods different from .pa those of Appendix C to *Reduced Spacing* may be valid, we are not prepared at this time to institute other approaches where no concrete proposals have been suggested.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that Federal Express Corporation's Petition for Reconsideration and Clarification IS GRANTED to the extent described above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986) (Blanket Licensing).

[2] Blanket Licensing at para. 10.

[3] The following parties filed supporting comments on Federal Express's petition: GTE Spacenet Corporation, Hughes Communications Galaxy, Inc., and M/A-Com, Inc.

[4] Since the Commission's initial order establishing licensing policies for small antennas, American Broadcasting Companies, Inc., 62 FCC 2d 901 (1977), we have authorized a variety of facilities and services using small antennas where applicants can demonstrate that unacceptable interference levels will not result. *See, e.g.*, Routine Licensing of Earth Stations in the 6 GHz Band Using Antennas Less than 9 Meters in Diameter for Narrowband Transmissions, 50 Fed. Reg. 40019 (October 1, 1985) (Declaratory Order).

[5] Such a possibility was raised in the Phase II Report of the Reduced Orbital Spacing Advisory Committee with respect to parameters for routine licensing of 4/6 GHz antennas, *see Declaratory Order supra* note 4.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Application of

GTE SPACENET CORPORATION File No. 1553-DSS-MP/ML-86

For Modification of Authority to Construct the Fourth Spacenet Domestic Fixed-Satellite

## ORDER AND AUTHORIZATION

**Adopted: December 5, 1986 Released December 16, 1986**

By the Common Carrier Bureau:

1. GTE Spacenet Corporation (GTE Spacenet) is requesting authority to modify its fourth Spacenet satellite.[1] This satellite is authorized to be constructed, launched and operated in both the 4/6 and 12/14 GHz bands.[2] GTE Spacenet's requested modification would enable it to add command-enabled receiver package on the space station that would receive earth-to-space transmissions in the 1610-1626.5 MHz band. These transmissions would then be routed to one of the previously authorized transponders for retransmission to earth in the 11.7-12.2 GHz band. Except for this additional capability to relay signals between the 1.6 GHz and 12 GHz bands, the operating parameters of the space station will remain unchanged.

2. GTE Spacenet's proposed modification is made at the request of its customer, Geostar Corporation (Geostar), for whom the GSTAR-II and III satellites were similarly modified.[3] The modifications will permit Geostar to offer developmental radiodetermination satellite service (RDSS) to the public while Geostar's dedicated RDSS system is being implemented.[4] The proposed modification on the Spacenet satellite is intended to provide replacement capacity for a similar package included on GSTAR II, which failed shortly after the satellite commenced operations.

3. We will grant GTE Spacenet's request. No objections or comments were filed with respect to this request, and grant of the application will allow the public early access to radiodetermination satellite service.

4. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that Application File No. 1553-DSS-MP/ML-86 IS GRANTED, and GTE Spacenet Corporation IS AUTHORIZED to modify its fourth Spacenet satellite as specified in its application.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

### FOOTNOTES

[1] Because its third Spacenet satellite was involved in a launch failure in September 1985, the satellite for which modification authority is requested will be designated Spacenet III once it successfully reaches geostationary orbit.

[2] Southern Pacific Communications Company, 94 FCC 2d 457 (1983), and GTE Spacenet Corporation, 103 FCC 2d 644 (1985).

[3] GTE Satellite Corporation, Mimeo No. 5175 (released June 16, 1986); GTE Satellite Corporation, Mimeo No. 1181 (released December 2, 1985).

[4] Geostar was recently authorized to construct, launch and operate an RDSS system. *See* Geostar Corporation, Mimeo No. 6144 (released August 7, 1986).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

JOHNSTOWN
CELLULAR
COMMUNICATIONS
CO. File No. 18206-CL-P-143-A-86

For a construction permit to
establish a cellular system
operating on Frequency Band A
in the Domestic Public Cellular
Radio Telecommunications System
for the Johnstown, Pennsylvania
MSA

**MEMORANDUM OPINION AND ORDER**

**Adopted December 9, 1986; Released December 16, 1986**

By the Chief, Common Carrier Bureau:

**A. Introduction**

1. Cellcom Cellular Telephone Service (Cellcom) has filed a petition to dismiss or deny the above-captioned application for the non-wireline construction permit for the Johnstown, Pennsylvania Metropolitan Statistical Area (MSA). The application of Frank R. Avallone, Jr. was selected first in the lottery held for the market on May 5, 1986. Frank R. Avallone, Jr.'s application later was amended by substituting the settlement partnership called Johnstown Cellular Communications Co. (Johnstown Cellular) as the applicant. The Commission announced Johnstown Cellular as the tentative selectee in *Public Notice*, Report No. CL-86-178, released June 2, 1986. The petition is opposed by Johnstown Cellular.

**B. Financial Qualifications**[1]

2. Cellcom alleges that Johnstown Cellular has failed to demonstrate that it has a firm financial commitment because Johnstown Cellular has provided neither an adequate bank commitment letter nor a "net liquid assets showing" based on a balance sheet. It notes that MEA itself has not provided a balance sheet and argues that the balance sheet of MEA's parent, Mitsubishi Electric Corporation (MELCO), is not current and fails to demonstrate net liquid assets equal to the required funding.[2]

3. Johnstown Cellular responds that MEA has certified to the Commission, in paragraph 6 of its June 27, 1986 letter, that it has sufficient funds available to finance the Johnstown Cellular application. Further, it notes that, to support the certification, MEA attached a letter from MELCO, the parent company of MEA, committing funding to MEA for the Johnstown Cellular project. Johnstown Cellular contends that the MELCO letter and MELCO balance sheet are more than sufficient to meet the financial requirements of Johnstown Cellular. It refers to the line of Commission precedent holding that a demonstration of ownership of total assets vastly in excess of the amount committed will substitute for the net liquid assets showing.[3]

**Discussion**

4. Section 22.917(b)(1)(i) of the Rules requires applicants obtaining financing from entities other than a recognized lending institution to submit proof that the financing entity has the funds available and uncommitted to another cellular application. The June 27, 1986 MEA letter demonstrates that MEA, as an entity other than a recognized lending institution, has the funds available and uncommitted to another cellular application. MELCO's June 6, 1986 letter agrees to provide MEA funding up to an amount of $20,000,000. MELCO's attached balance sheet demonstrates, under the "total assets" test, that it has sufficient assets to fund a $20,000,000 commitment. Its total net assets for the year ending March 31, 1985 were approximately $1.6 billion. Thus, its total net assets-to-commitment ratio is almost 80 to 1. This is a considerably stronger financial showing than that found acceptable in *American Cellular Corp., supra*.[4]

**C. Technical Qualifications**

5. Cellcom also contends that Johnstown Cellular's technical proposal fails to meet the Commission's "letter perfect" standard. First, it argues that Johnstown Cellular's failure to complete question 33(j)(1) of Form 401, schedule B, in itself renders the application unacceptable. Second, it suggests that Johnstown Cellular utilized obsolete emission designators in answering question 33(j)(3) of Form 401, Schedule B. It cites *Public Notice*, Mimeo No. 0729, released November 5, 1985, which it characterizes as indicating that the "old" emission designators no longer may be used.

6. Finally, Cellcom asserts that Johnstown Cellular has misread the antenna site elevation for its one proposed cell by approximately 50 feet, and that this misreading results in an increase in the applicant's 39 dBu contour beyond that shown in Johnstown Cellular's technical proposal. It alleges that the increase, in three directions by about three miles, places the 39 dBu contour farther into the Pittsburgh MSA than is demonstrated by the Johnstown Cellular proposal. Cellcom attaches the affidavit of a mechanical engineer. The affidavit includes summary data purporting to list the correct contour at the eight cardinal radials of the cell.

7. In its reply to the petition to deny, Johnstown Cellular responds to each of Cellcom's allegations. First, it states that the frequencies required by question 33(j)(1) of Form 401 are "index referenced" properly in question 37 of Form 401. Second, Johnstown Cellular notes that its engineering consultant, whose affidavit is attached, avers that he was advised by the Commission that the old emission designators were acceptable and that the Commission would not reject an application utilizing this data.

8. Finally, Johnstown Cellular states that the site elevations are acceptable. It refers to its engineering consultant's affidavit that the ground elevations used in question 37 are the same as those for a TV station next to the proposed tower location. It advises that terrain at the location is very rough such that it is impossible for any engineer to obtain a precise ground elevation. It concludes that, notwithstanding any minor differences in measurement, the coverage area does not change and the

39 dBu contour does not extend beyond that which is plotted. Its engineer avers that it is unlikely that a 50 foot error would change the radial mileage by the alleged three miles.

## Discussion

9. *The " Letter Perfect " Standard.* The "letter perfect" standard applies only to initial intake of cellular applications and is inapplicable to post-lottery review of lottery winners.[5]

10. In its May 1985 cellular lottery *Reconsideration Order*, the Commission announced that ". . . we will require all future cellular applications [for markets 121 and beyond] to be filed in a 'letter perfect' condition, and failure to conform to this standard will constitute grounds for rejection of the application as unacceptable for filing." *See Memorandum Opinion and Order on Reconsideration*, 101 F.C.C 2d 577, 603-04 (1985). The Commission adopted this standard because in markets 91 to 120 many of the filings had failed to provide identifying information at the front of the applications, had intermixed legal and engineering information, and had contained lengthy boilerplate exhibits, making it difficult for the staff to log in and pre-screen applications. As a result, lotteries for these markets had been delayed for over a year, pending completion of the pre-screening process. The requirement that applications for markets 121 and beyond be "letter perfect" was intended to streamline applications processing, thereby avoiding the delays previously encountered by the Commission in pre-screening applications. Before accepting applications for markets 121 and beyond, however, the Commission modified its pre-lottery processing requirements in its *Further Reconsideration Order* of December 1985.

11. The *Further Reconsideration Order* requires each applicant to certify, under penalties of law, that its application is complete and contains all information required by the cellular rules and application form. *See Memorandum Opinion and Order on Further Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985). Applications containing the certification *and* complying with specified processing requirements are accepted for filing and included in the lottery.[6] After the lottery the application of the first-ranked applicant in a market is screened thoroughly to ensure compliance with the cellular standards. If the certification is in error because the application is defective, the application is dismissed. *Id.*

12. Thus, the common intent in the May and December 1985 orders was to streamline the pre-lottery processing of applications for markets 121 and beyond. The Commission's concern was that the staff members who process cellular applications must be able to determine efficiently and quickly, before a lottery is held, whether processing requirements have been met. To that end, the Commission required applications to be "letter perfect" as to these requirements. *Reconsideration Order* at 603-04. Prior to accepting applications for these markets, the Commission modified its processing requirements. As set forth in the *Further Reconsideration Order*, each applicant was required to certify to the completeness of its application, and to provide certain specified information on the cover of its application in order to qualify for the lottery. *Further Reconsideration Order* at 410 at n. 16. It is to these matters, therefore, that the "letter perfect" standard applies. *See PacTel Mobile Access, supra*, at para. 10. Because the concerns associated with expeditiously processing vast numbers of applications before a lottery simply were not present in the post-lottery review of only the winning applicants, we do not read the Commission's orders as intending to require that applications for markets 121 and beyond be "letter perfect" at the post-lottery stage. Rather, winning applications must demonstrate "compliance with the cellular application standards and will be dismissed for failure to do so." *Further Reconsideration Order* at 410.[7]

13. In reaching this conclusion, we are aware of dicta in two of our earlier orders stating that the "letter-perfect" standard would be applied in the staff's post-lottery review of winning applications.[8] That statement was made without full analysis of the Commission's orders and was erroneous. For the reasons stated in this order, we conclude that the correct reading of the Commission's orders is that the "letter perfect" standard was intended to apply only to pre-lottery processing of applications.

14. *Frequency Data.* Where, as here, an applicant submits all required engineering data necessary to process the application, but omits entering this data in one of two places on Form 401, we do not find the omission of the duplicative data to be a violation of our rules. Here, Johnstown Cellular entered the required frequency information in question 37. The same information is required by question 33(j)(1).

15. *Emission Designators.* Cellcom's argument that Johnstown Cellular has used obsolete emission designators is similarly unpersuasive.[9] The November 5, 1985 public notice referenced in Cellcom's pleading merely notified the public that the Mobile Services Division shortly would begin to issue authorizations with the new emission designators. It stated that, "(i)t should be emphasized that the new system of emission designators simply represents a different method of describing emissions, and does not require any actual changes to a licensee's equipment." Further, although Form 401, which is utilized for cellular as well as non-cellular filings, calls for entry of emission designator data, this data is not incorporated into cellular construction permits and licenses as it is for non-cellular applications. Finally, the staff of the Mobile Services Division consistently has advised members of the public that either set of designators is acceptable.

16. *Antenna Site Elevation and 39 dBu contours.* Cellcom has failed to show that Johnstown Cellular's engineering data is incorrect. It provides only an affidavit of its mechanical engineer to support its allegation that Johnstown Cellular misread the antenna site elevation. It does not provide a copy of the 7.5" U.S.G.S. map from which the engineer states she derived the reading. More importantly, even if site elevation were 50 feet higher than that contained in the application, we do not see a problem with the 39 dBu contour. The figures for Height of Antenna Radiation Center Above Average Elevation of Radial were all, except at the 315o radial, significantly less than 100 feet.[10] The applicant calculated the Distance to Reliable Service Area Contour figures by using a 100 foot 50/50 curve for all radials except at 315o. Thus, the calculation methodology itself generally would compensate for the alleged 50 foot error in the antenna site elevation.[11] Moreover, even with the alleged 50 foot increase in antenna site elevation, the Distance to Reliable Service Area Contour for the 315o radial would increase only from the stated 9.4 to 10.3 miles, not to the 12.3

miles calculated by Cellcom's engineer.[12] Under these circumstances, where the application is grantable without need for an amendment or further information, we do not find a violation of our rules.

17. After careful review of the application and associated pleadings, we find Johnstown Cellular legally, technically and otherwise qualified to become a Commission licensee.

### D. Ordering Paragraphs

18. Therefore, for the foregoing reasons, IT IS ORDERED, That the application of Johnstown Cellular Communications Co., File No. 18206-CL-P-143-A-86, IS GRANTED with the condition that the authorization does not include the right to any interference protection in any areas outside the Johnstown MSA and with the further conditions that Johnstown Cellular coordinate with current and future licensees in adjacent markets and provide interference-free operations to licensees in those areas.

19. The Petition to Dismiss or Deny IS DENIED.

20. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

### FOOTNOTES

[1] Cellcom's first argument is that the June 27, 1986 letter from Mitsubishi Electric America, Inc. (MEA) to Johnstown Cellular, entitled "Firm Financing Commitment and Letter Purchase Agreement for Johnstown, Pennsylvania" appears not to have a signature of an MEA officer, and that therefore there is no basis to assume that the commitment has any "force and effect." In its reply to the petition to deny, Johnstown Cellular states that the original of the MEA letter, on file with the Commission, is in fact signed, although unfortunately in blue ink that did not appear on the copy. Johnstown Cellular is correct that the original letter is signed in blue ink over the title of an officer of MEA.

[2] Cellcom states that Johnstown Cellular fails to prove that the net liquid assets of MELCO are equal to the funding required for applicant's "Daytona Beach" project. We will assume that Cellcom's argument refers to the Johnstown, Pennsylvania MSA facilities.

[3] *See American Cellular Corp.*, 103 F.C.C. 2d 26, 30-31 (1986) (a demonstration of total net assets in excess of 14 times the amount of the commitment is sufficient to dispense with the net liquid assets requirement).

[4] In *Arnold C. Leong*, Mimeo No. DA 86-197, released November 14, 1986, we found MELCO's assets more than sufficient to fund its July 18, 1986 commitment to MEA of $30,000,000. Together the $30,000,000 and $20,000,000 commitments of, re spectively, July 18, 1986 and June 6, 1986, allow for a 32 to 1 ne assets-to-commitment ratio.

[5] To the extent that dicta in earlier orders is inconsisten with this statement, we take this opportunity to clarify th "letter perfect" standard. *See, e. g., Peter and Rosema Gabrielle*, Mimeo No. 3957, released April 24, 1986, and *Colu bia Communications*, Mimeo No. 3975, released April 23, 1986.

[6] *Id.* Applications that fail to meet the specified processin requirements -- by, for example, failing to include a mark name or number -- are dismissed as unacceptable for filin before the lottery. *See, e.g., PacTel Mobile Access, Order o Review*, FCC 86-496, released November 12, 1986.

[7] Under Section 22.918(b), amendments to applications ma not be filed until a tentative selectee is placed on public notic and then only by the tentative selectee. Thus, the winnin applicant may not file curative amendments prior to sta screening to determine compliance of its application with th Commission's application requirements. *See Further Reconside ation Order* at 410, n. 17.

[8] *See* note 5, supra. In the *Gabrielle* and *Columbia* cases, w dismissed applications at the pre-lottery stage for failure t comply with the Commission's specified processing require ments. To the extent that we applied the "acceptable for filing standard of Section 22.20, rather than a "letter perfect" sta dard, to decide those cases, we were wrong. "Letter perfect does apply to the pre-lottery process. We note, however, th the result in those cases would not have changed with th application of a "letter perfect" standard. Under either th "acceptable for filing" standard of Section 22.20 or the "lette perfect" standard applicants at least must comply with specifi requirements set forth in the Commission's rules. In *Gabriel* and *Columbia*, there was no such compliance.

[9] The application, at question 33(j)(3) of Form 401, Part II contains the entry, "40F9/40F9Y" to designate respectively th cellular voice channels and cellular signalling channels. Th new emission designators are respectively 40K0F3E an 40K0F1D.

[10] To the extent that Cellcom may be questioning the figure for Average Elevation Along Radial Above Mean Sea Level, has provided no values or calculations to support an allegation that the applicant's figures are incorrect.

[11] Our calculations show that the Distance to Reliable Servic Area Contour for the 180o radial would increase from 8.4 to 8 miles, and for the 225o, from 8.4 to 8.7 miles, if in fact ther were a 50 foot error in antenna site elevation.

[12] As noted in paragraph 6, Cellcom argues that its calcula tions demonstrate that the 39 dBu contour will extend farthe into the Pittsburgh MSA. Our rules do not preclude a mino extension of 39 dBu contours into an adjacent central MSA the application includes an engineering showing demonstratin why the extension is necessary. *See Cellular Radio Service*, Rad.Rag. 2d (P&F) 1583, 1587 (1984); *Bell Atlantic Mobile Sy* ems, 103 F.C.C. 2d 171, 173, 177-183 (1986). Johnstown Ce lular's application, at Exhibit 3, provides such a showing. states that because of the irregular boundary and rough terra the Cell 1 39 dBu contour has been engineered to overlap th MSA boundary to provide better service within the CGSA, an that the extension is de minimis. Our engineering review co cludes that the extension is minor, and would be minor eve with the alleged 50 foot error.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

PONCE TELEVISION CORPORATION
(WLUZ-TV) File No. BPEX-851108KH
Ponce, Puerto Rico

For Authorization to Construct
an Experimental Broadcast Facility

## MEMORANDUM OPINION AND ORDER

**Adopted: October 6, 1986 Released: December 18,1986**

By the Commission:

1. The Commission has under consideration: (a) the above-captioned application of Ponce Television Corporation (PTC),[1] licensee of Station WLUZ-TV, Channel 7, Ponce, Puerto Rico, for authority to construct an experimental broadcast facility; (b) petitions to deny that application filed by the following Puerto Rico broadcasters: Telemundo, Inc. (Telemundo), licensee of Station WKAQ-TV, Channel 2, San Juan; SFN Communications of Puerto Rico, Inc. (SFN), licensee of Station WAPA-TV, Channel 4, San Juan; Telecinco, Inc. (Telecinco), licensee of Station WORA-TV, Channel 5, Mayaquez; American Colonial Broadcasting Corp., licensee of Stations WLII(TV), Channel 11, Caguas-San Juan, and WSUR-TV, Channel 9, Ponce; and WNJX-TV, Inc. (WNJX), permittee of WNJX-TV, Channel 22, Mayaguez; (c) informal objections filed by: Western Broadcasting Corporation of Puerto Rico (Western), licensee of Station WOLE-TV, Channel 12, Aguadilla; Hector Nicolau, permittee of WTIN(TV), Channel 14, Ponce; Multi Media Television, Inc. (Multi Media), licensee of Station WKPV(TV), Channel 20, Ponce; The Ana G. Mendez Educational Foundation (Foundation), licensee of noncommercial educational Station WQTO(TV), Channel 26, Ponce; Tele 38, Inc., licensee of WJWN-TV, Channel 38, San Sebastian; R&F Broadcasting, applicant for a new station to operate on Channel 52, Carolina; and Bocanegra and Girald Broadcasting Corp., permittee of Station WVSN-TV, Channel 68, Humacao; (d) a "request for treatment of application as a new station/major change application" filed by Bay Broadcasting, Inc. (BBI), licensee of Station WRWR-TV, Channel 30, San Juan; (e) PTC's consolidated opposition; and (f) related pleadings.

2. Station WLUZ-TV presently operates on Channel 7 from a transmitter site located on Cerro Maravilla, a mountain five miles southeast of Jayuya, in a northerly direction from Ponce, Puerto Rico. PTC submits that when coverage is calculated according to Section 73.684 of the Commission's Rules, the predicted Grade B signal contour covers the entire island of Puerto Rico. However, it asserts that the presence of mountainous terrain throughout the island causes many areas to be shadowed from the Cerro Maravilla transmitter, providing poor or no service to many population centers within the predicted Grade contour, including Mayaquez, Aguadilla and many parts of San Juan. PTC maintains that the inability to reach the greater number of people within its service area and to derive the corresponding advertising revenues attaching to such wider coverage has handicapped the station's ability to develop and further improve the quantity, variety and quality of its program offerings. The cummulative effect of years of such substandard coverage and diminished advertising revenues, it claims, now threatens the very existence of the station and portends the loss of a local full-service television station in Ponce.

### THE PROPOSED EXPERIMENT

3. In an effort to overcome what it terms the severe and adverse consequences of terrain obstructions on the ability of the public to receive the signal of WLUZ-TV, PTC seeks authority to conduct a program of experimentation designed to analyze reception under actual conditions employing new engineering technology in a manner never before attempted. Specifically, PTC proposes to use three widely spaced transmitting facilities, with circularly polarized antennas at low elevations in front of mountain peaks, all operating simultaneously on WLUZ-TV's assigned Channel 7 frequency to bring its local service to large areas of the island within the station's predicted Grade B contour, but presently without actual reception. The first transmitter (hereinafter referred to as the "South Site") will be located in the Magueyes Urbano section of northern Ponce to cover that city and parts of the south coast, operating with an effective radiated power (ERP) of 100 kW and a directional antenna used to limit radiation in the direction of San Juan. The second transmitter (North Site) will be located 61.5 kilometers (38.2 miles) away, near Cerro Marquesa, just south of San Juan, to cover that city and the east end of the island, operating with maximum power of 316 kW and a directional antenna used to limit radiation in the direction of Ponce. The third transmitter (West Site) will be located 65.3 kilometers (40.6 miles) from the Ponce facilities and 111.8 kilometers (69.5 miles) from the San Juan site, in the hills between Mayaguez and Aguadilla, operating with an ERP of 5 kW and a "peanut-shaped" directional pattern to cover those two cities and other parts of the island's west coast. It is expected that the specified directional patterns will provide good coverage of desired areas while the use of directional antennas, natural terrain shielding and precise frequency offset would minimize interference between the transmitters. During the course of experimentation, the directional patterns may be modified if it is deemed advisable in order to improve coverage or reduce interference. Because WLUZ-TV's predicted Grade B contour now includes the entire island, PTC submits that any antenna changes will not extend predicted service to new areas. Moreover, as proposed, the experimental operation will not create interference to any co-channel or adjacent channel assignment and, although licensed under Part 74 of the Commission's Rules pertaining to experimental stations, each facility will comply with the applicable sections of Part 73, relating to standard broadcast operations, as well.

4. Upon receipt of the necessary authorization for the proposed experiment, PTC states that it can and will immediately proceed with construction of the proposed facilities and, thereafter, commence operations. The construction and operation will be directed and supervised by Mr. Tom Bracanovich, Malrite's Vice President for En-

gineering and PTC's proposed Director of Engineering, who has over 25 years of experience in the broadcast industry. Although engineering studies it has prepared predict that the objective of greater coverage can be accomplished by judicious application of directional antennas, terrain shielding and precise frequency offset, as well as careful site selection, during the period of experimental operation reception under actual conditions employing the multiple-transmitter approach will be analyzed with adjustments made as such analysis dictates.[2] PTC states that it also may conduct a promotion soliciting individual viewer responses as to the nature and extent of their reception. Further, PTC will report the results of its efforts to the Commission on an ongoing basis.

5. Because the essence of the experiment is to assess the impact of the proposed transmission system on actual over-the-air reception of program matter, PTC plans to transmit actual broadcast programming with commercial matter over its experimental station. It maintains that such a course is particularly appropriate because experimentation without broadcasting regular programming would require termination of existing Channel 7 program service to Ponce and the station's service area. For that reason, it suggests that unmodulated carriers, pulses, tones, or test patterns cannot be used as a substitute for existing WLUZ-TV service. Moreover, without such standard broadcast programming, PTC believes that obtaining viewer reaction will not be possible, depriving it of perhaps the single most important source of data for analyzing the effectiveness of the experimental operation and hampering efforts to "fine-tune" the transmitting system to improve reception and eliminate any destructive interference between the transmitters.

6. Once implemented, PTC states that the proposed experimental operation will provide the Commission with valuable empirical data to assess, in the context of spectrum planning, the feasibility of utilizing combinations of directional antennas, terrain shielding effects and precise frequency offset to overcome natural terrain obstructions in similarly isolated mountainous areas. It maintains that the use of multiple transmitters are vital to compiling such data and making such analyses. It states that alternative methods it has examined to achieve its goal are infeasible without causing substantial harm to overall broadcasting on the island. Further, PTC believes that, as proposed, its experiment is structured in a manner consistent with Commission policies and designed to serve the public interest. Because all experimental operations will be conducted on WLUZ-TV's assigned Channel 7 frequency, PTC notes that no wasteful use of other UHF or VHF television channels as broadcast satellites or relays is required, and no preclusion of any future use of Channel 7 will be caused in any area not already precluded by virtue of WLUZ-TV's present operation. In that regard, it states that the proposed method of experimentation will not only result in no loss of existing WLUZ-TV program service, but will also increase actual service within its existing Grade B contour, reaching many island residents for the first time. Accordingly, PTC urges the grant of its application as a proper method to study the feasibility of greater actual coverage and improvement of service in similar areas with natural geographic constraints.

## THE PLEADINGS

7. The petitioners and objectors (hereinafter collectively referred to as the petitioners) generally maintain that substantial and material questions exist as to: (a) whether the PTC proposal is a *bona fide* experiment for the sake of contributing to the development of the technical broadcasting art; and (b) whether the public interest would be served by the grant of this application. BBI suggests that if PTC's application is not dismissed as incomplete, it should not be treated as one for an experimental station, but rather as one for a regular broadcast authorization which, if acceptable, should be placed on a cut-off list so that other applicants may compete for a construction permit subject to formal petitions to deny. While PTC raises various questions regarding the procedural deficiencies of a number of these pleadings, we believe that the public interest requires that these allegations be addressed and resolved on the merits. Accordingly, we will treat the various issues below.

8. It is maintained that in numerous cases, the Commission and the courts have rejected the contention that an application could be deemed experimental when, in substance, it proposed regular commercial broadcasting. *See, e. g., Capitol Broadcasting Co. v. F. C. C.*, 257 F.2d 630 (D.C. Cir. 1958). It is the petitioners' belief, as detailed below, that PTC's proposal is not a *bona fide* experiment, but rather another effort on behalf of a licensee of this station to transform it into one primarily serving the more populated areas of Puerto Rico in general and San Juan in particular, at the expense of service to Ponce, WLUZ-TV's city of license. In that regard, they note that the station began broadcasting in 1958 and that its history of operations underscores previous efforts to penetrate the San Juan market. They relate the following. In 1969, the Commission denied PTC's request to identify as a Ponce-San Juan station, while permitting it to originate entertainment programming from an auxiliary studio in San Juan as an exception to the main studio program origination rule. *Ponce Television Corp.*, 17 FCC2d 411, *recon. denied*, 18 FCC2d 543 (1969). In so doing, the Commission imposed certain conditions on PTC's use of its San Juan studios to ensure continued service to Ponce, the station's designated city of license. In 1971, PTC filed an application to modify the station's facilities and move its transmitter site to a location closer to San Juan than Ponce. The Commission designated that application for hearing specifying, among the issues, whether, on the basis of the conditions imposed on its use of the San Juan facility, PTC had moved the station's main studio from Ponce to San Juan without prior Commission approval. *Ponce Television Corp.*, 33 FCC2d 940, 947 (1972). Although that application was subsequently withdrawn by PTC and dismissed with prejudice, PTC paid a $10,000 forfeiture in connection the main studio issue. Thereafter, in September 1973, PTC filed a "Petition for Declaration of Policies with respect to Television Service in Puerto Rico" seeking, among other things, a Commission policy statement to the effect that the particular nature of broadcasting on the island requires it, as well as similarly situated Puerto Rico licensees, to have "equal access" to the populous and lucrative San Juan market, thus necesitating redesignation of Channel 7 as a Ponce-San Juan assignment. *Channel 7, Puerto Rico*, 45 FCC2d 1139 (1974). Rejecting PTC's contentions as insufficient to justify the extraordinary relief sought, PTC's requests were denied. *Channel 7, Puerto Rico*, 58 FCC2d 1148 (1975).

9. With respect to the *bona fides* of this application, the petitioners generally assert that PTC's application fails to make the necessary showings required by Section 74.131 of the Commission's Rules regarding experimental operations. They maintain that the proposal fundamentally lacks "a definitive program of research and experimentation in the technical phases of broadcasting which indicate reasonable promise of substantial contribution to the developments of the broadcasting art" as required by Section 74.131(a)(1). In that regard, they allege that PTC's application contains insufficient technical information, indicating that no definitive program exists for reliably measuring the service and interference consequences of its proposed operation at different times and locations and offering no basis for comparing such results and measurements to the station's existing service. They also allege that PTC's proposed use of viewer surveys as a primary source of amassing data fails to comply with Section 74.131(a)(4)'s directive "that the program of research and experimentation will be conducted by qualified personnel." They believe the information to be gathered from the proposed multiple-transmitter operation would require careful engineering supervision and analysis to provide meaningful scientific results for which there is no indication PTC could provide. The petitioners further maintain that PTC has failed to demonstrate "that the transmission of signals by radio is essential to the proposed program of research and experimentation," required by Section 74.131(a)(3), contending that there are other existing television stations utilizing precision offset and directionalized antennas which, assuming the need for a study, could be examined. Additionally, they suggest that the precise effects of terrain obstructions could be learned by PTC studying its own existing service.

10. The petitioners further assert that, as a Commission licensee, PTC currently enjoys exclusive use of Channel 7 in Ponce. They contend that PTC could not maintain such exclusivity if it turns that operation into an experimental facility, as Section 74.131(b) provides that the Commission "will not authorize an exclusive use of any frequency" for an experimental station. Moreover, in addition to surrendering its exclusive use of Channel 7, the petitioners argue that PTC would have to share that frequency with others wishing to engage in similar experiments.[3] Further, petitioner Telecinco submits that, in essence, PTC proposes to construct three separate experimental stations, albeit operating on the same channel. In its opinion, having failed to set forth an adequate plan of experimentation demonstrating the need for such separate facilities, PTC's proposal violates Section 74.134 of the Rules, which provides that no person "shall control, directly or indirectly, two or more experimental broadcast stations unless a showing is made that a program of research requires licensing of two or more separate stations."

11. The petitioners also allege that PTC's proposal is inconsistent with the experimental strictures on program service and charges. They note that Section 74.182(a) provides that the "licensee of an experimental broadcast station may transmit program material only when necessary to the experiments being conducted, and no regular program service may be broadcast unless specifically authorized." In addition, Section 74.182(b) states that the "licensee of an experimental broadcast station may make no charges or ask for any payment, directly or indirectly, for the production or transmission of any programming or information used for expermental broadcast purposes." In the instant case, the petitioners observe that PTC proposes to broadcast only regular commercial programming. Although PTC states that the essence of its experiment is to assess the impact of the proposed transmission system on actual over-the-air reception of program matter, the petitioners claim that its proposal to broadcast regular commercial material raises a question as to whether the proposal is a *bona fide* experiment. They state that if the purpose of the proposal were legitimate scientific research, the broadcast of regular commercial programming would be totally unnecessary. In fact, the petitioners suggest that for the enunciated purposes of its experiment, it would be more effective to broadcast non-program material such as unmodulated carriers, pulses, tones or test patterns. The use of such non-program transmissions, they claim, also more closely reflects the Commission's preference, implicit in Section 74.182(a), that regular broadcast material should not be utilized, unless necessary, to conduct scientific research. In any event, the petitioners uniformly agree that PTC has failed to demonstrate adequately that the use of regular commercial programming is necessary to carry out its planned experimentation and research. Moreover, they submit that that proposal to deviate substantially from the rules regarding operation of experimental facilities indicates that PTC intends to receive financial gain from operation of the experimental stations, a factor underscored by its stated purpose for filing the application; that is, to increase substantially the station's coverage to more heavily populated areas of Puerto Rico.

12. Finally with regard to the necessary showings to be made in applications for experimental stations, the petitioners observe that Section 74.131(c) of the Rules specifically states that such experimental licenses will be issued "only on the condition that no objectionable interference to the regular program transmissions of broadcast stations will result from the transmissions of the experimental stations." Engineering studies submitted by a number of the petitioners claim that, as proposed, each separate transmitter will cause objectionable, and in some cases substantial, interference to the other Channel 7 transmitters due to their short spacing. Absent consideration of PTC's proposed precision offset, petitioner Telemundo claims that there would be an area of 1,877 square miles (more than half the island's area), including 973,916 people (more than 30 percent of the island's population), which would suffer such predicted co-channel interference. If the proffered precision offset technique is accepted, it claims that 1,502 square miles, including 779,341 people, would still be subject to such objectionable interference.[4] Further, the petitioners argue that merely because the proposed transmitting stations would all be licensed to PTC does not exempt it from compliance with the Commission's transmitter mileage separation requirements. They contend that the resulting loss of service in areas currently receiving service is not obviated by the common ownership or operation of the three transmitters. Objector Foundation notes that in a similar situation, its own request to operate with short-spaced transmitters was denied by the Commission. It states that its application to operate a noncommercial educational television on Channel 26 proposed a transmitter site nine miles short spaced to its own Station WMTJ(TV), Channel 40, Fajardo, Puerto Rico. In seeking a waiver of Section 73.610 of the Commission's Rules, the Foundation argued, among other things, that: the selected site was

the best available for environmental and developmental reasons; co-channel interference was expected to be very small due to intervening terrain and sparse population in affected areas; and any interference would affect only its own signal. Nevertheless, on November 23, 1983, that request was denied on the basis that it had not demonstrated that other fully spaced sites were unavailable. The Foundation maintains that the Commission did not consider that terrain reduced the potential for interference to a virtually nonexistent level, or that only its own signal would be affected, as sufficient to override the policies underlying the table of allocations. Thus, the Foundation urges that such considerations should no more favor PTC's proposal than its own, and that the principles applied by the Commission to reject its proposal for Channel 26 should be uniformly applied to PTC's request for three short-spaced transmitters on Channel 7.

13. Aside from consideration of the experimental rules as discussed above, the petitioners reiterate that the applicant's supporting documentation for its proposal is so lacking in specific and other technical data that the Commission cannot adequately gauge either the need for this type of experimentation or the plausibility of this proposal to achieve the desired objectives. They assert that PTC's terrain showing should contain, at a minimum, a detailed study of actual terrain compositions supported by field measurements of existing conditions. Yet, they claim, PTC's proposal lacks the support of any hard data, instead relying upon conclusory statements and coverage comparisons formulated on the basis of "good", "fair", and "poor" existing and proposed service conditions to specific communities of more than 10,000 people on the island. The petitioners insist that such analyses ignore the less populated areas of the island presently receiving inferior service due to their location in mountainous regions. But more significantly, they argue, PTC does not explain what "good", "fair", and "poor" service means either in engineering or objective terms; how they were derived; how they relate, if at all, to the Commission's traditional technical standards; the specific information and calculations used to arrive at these gradations of service, including the methodology used to predict desired and undesired signal levels; and the basis for inclusion or exclusion of certain population centers on the island. The petitioners contend that without this type of field test information, there is no way for the Commission to properly evaluate, much less accept, PTC's assertions regarding its present service.

14. The petitioners further argue that PTC's proposal ignores alternative methods available to it to conduct the same studies without disruption of existing Channel 7 service. These include conducting the experiment during limited parts of the station's broadcast day, during non-broadcast hours or on another frequency. Moreover, to the extent that PTC desires greater island-wide coverage, the petitioners maintain that other methods are available to PTC which would not require departure from the Commission's Table of Assignments and mileage separation requirements. They allege that PTC can enter into affiliation agreements, as have other stations in Puerto Rico and PTC in the past, to achieve a greater number of viewers throughout the entire island. Further, they insist that the use of translators is the most commonly accepted means of "filling in holes" in a station's predicted contours due to terrain. Yet, they argue, PTC's application reflects no consideration of acquiring additional translators to augment existing coverage, other than suggesting that they might be used to resolve some interference and loss of service problems resulting from its experimental operation. The petitioners urge that such a use of translators, *i. e.*, as a means of replacing lost service rather than strengthening existing service, is contrary to long-standing Commission policies providing for a practical alternative for efficient use of allocated frequencies. Finally, in this regard, it is noted that PTC presently has pending an application (File No. BPCT-8508822KN) to modify the existing WLUZ-TV facilities by increasing the height of its antenna and changing its effective radiated power. The petitioners allege that this application to modify its existing facilities impermissibly conflicts with its present application to operate the proposed experimental station on the same channel.[5] However, despite that conflict, the petitioners argue that, under the circumstances presented here, it is more appropriate for this licensee to seek to expand its coverage area by pursuing modifications to its existing facilities rather than by replacing WLUZ-TV's existing operation with a highly speculative experiment which, even if successful, is of limited use to broadcasting in general and other Puerto Rican broadcasters in particular.

15. With respect to the alleged benefits to broadcasting in Puerto Rico which PTC claims will result from its experimental operation, the petitioners believe that this proposal has no application beyond the self-serving attempt of this licensee to achieve greater coverage, in the guise of an experiment, than could be gained under the provisions for standard broadcast operations contained in Part 73 of the Commission's Rules. In this regard, objector Multi Media has submitted an engineering statement which claims that there are no other stations in Puerto Rico operating on channels that could restrict placement of WLUZ-TV's proposed multiple transmitters. With no such site restrictions, it claims that PTC is free to place these transmitters throughout the island in such a manner as to maximize desired coverage constrained only by intra-system interference which it will allegedly minimize. However, it states that for many UHF stations in Puerto Rico, channel spacing restrictions are significant enough to deny them the benefits of the multiple-transmitter approach. For example, Multi Media states that potential sites for its station, WKPV(TV), operating on Channel 20 in Ponce, are limited on the western side of the island by stations operating on channels 16 and 22 in Mayaguez; on the northeastern side of the island, potential sites are restricted by stations operating on Channel 34 in Fajardo and Channels 18 and 24 in San Juan.[6] Although adequate coverage of those areas is theoretically possible from the sites that would be available to it, Multi Media contends that there would be no flexibility to place such transmitters so as to: maximize desired wide-area coverage to those parts of the island: provide for convenient and efficient operations with adequate transmitter separation; and provide a competitive signal because receiving antennas are oriented toward the transmitters of existing stations in those areas rather than toward locations available for use by a station operating on Channel 20.

16. Further and apart from the alleged failure to design a serious program of experimentation, the petitioners contend that there is nothing in the subject matter of PTC's application to indicate that its proposal is necessary to gather information not already available or that its

findings would be of value to the technical art of broadcasting. They suggest that there is nothing new or novel about proposals involving precision offset, directionalized antennas or terrain shielding. It is asserted that more thorough studies and analyses of these factors and their effect upon television signal reception have been conducted in the past. The petitioners note that the use of directional antennas and precise offset have been previously rejected both as allocation tools and as bases for experimentation. *See Greater Washington Educational Telecommunications Association, (WETA )*, 53 FCC2d 910, 919-20 (1975). Similarly, they maintain, terrain shielding has been found to be too uncertain to be relied upon to predict, with an acceptable degree of confidence, the reduced signal levels resulting from terrain obstructions. *See Report and Order (VHF TV Top 100 Markets )*, 81 FCC2d 233, 257 (1980), *recon. denied*, 90 FCC2d 160 (1982), *aff d sub nom. Springfield Television of Utah, Inc. v. F. C. C.*, 710 F.2d 620 (10th Cir. 1983). To the extent that these technical concepts have been viewed with favor as having some effect upon signal propogation or interference calculations, the petitioners note they have been primarily reserved as "safety factors" in the event of resulting interference from newly developed propogation curves. *See, e. g., Notice of Proposed Rule Making (Table of Television Channel Allotments )*, 83 FCC2d 51, 84-5 (1980). Further, petitioner SFN alleges that this is not the first time the Commission has considered the use of same-channel VHF facilities to enable a broadcaster to reach areas which do not receive service due to terrain obstructions. It refers to *Docket No. 13924 (RM - 165 )*, FCC 61-673, 26 Fed. Reg. 4522 (1961), wherein the Commission considered a proposal to permit the use of signal amplifiers or "boosters" by the licensees of UHF television broadcast translators to supplement service provided by such operations, particularly in areas where signals were subject to shadowing by terrain barriers. While approving the use of such UHF boosters, the Commission rejected a further proposal to allow the use of VHF boosters, finding that the hazard of harmful interference is substantially greater on VHF channels than on UHF channels. Thus, SFN concludes that PTC's proposal is not only in direct conflict with the Commission's 1961 pronouncement, but also presents a greater potential for such undesired interference because, as fully powered television transmitters, they will operate at power levels far exceeding the power of the signal boosters rejected for use by VHF translators.

17. The petitioners do not dispute that terrain obstructions are a problem in Puerto Rico. They nevertheless argue that residents throughout the island, including many in interior sections who, in fact, receive a usable signal from WLUZ-TV, will lose such service due to the predicted co-channel interference occasioned by the proposed use of the three short-spaced transmitters. They maintain that PTC has not provided adequate information regarding these losses. Noting that WLUZ-TV's predicted Grade B contour covers the whole island operating with its present facilities, they assert that many viewers, particularly in some northwestern and southern parts of the island, will no longer be within that coverage area.[7] Further, the petitioners observe that traditional coverage calculations assume that interference will occur toward the outer part of a station's Grade B signal contour based upon the Commission's established transmitter mileage separation requirements, which would ordinarily provide for a 304.9 kilometer (189.5 mile) co-channel separation between VHF transmitters in Puerto Rico. However, because each proposed transmitting facility is short spaced to the others, with the greatest separation between any two being 111.8 kilometers (69.5 miles), the petitioners argue that objectionable co-channel interference is likely to be greater within WLUZ-TV's present Grade A and principal city grade contours.[8] The petitioners maintain that PTC has not discussed the impact of these service reductions, including the fact that the majority of the locations listed in its application would receive diminished or unimproved service over that now being provided. Further, they contend that most areas which will receive degraded service are on the south side of the island, near Ponce and generally considered to be served by the existing channel 7 facility there, while the majority of locations that PTC estimates will receive improved service are in the San Juan area. Thus, from the data presented, the petitioners conclude that PTC will greatly improve service to the San Juan area at the cost of reducing service to areas now depending on service from the Channel 7 facility licensed to and serving Ponce. Although the petitioners may differ as to the effect, they uniformly contend that areas currently receiving WLUZ-TV service will unquestionably lose such service under PTC's proposed experimental operation. They maintain that it is well established that gains in new service do not outweigh the losses in existing service, and that a curtailment of existing service, such as that likely here, is not in the public interest. Further, they argue that the losses of service within the station's Grade A and principal city grade contours cannot be offset by hypothetical gains in service to outlying communities. Petitioner Telemundo states that it is not enough for PTC to simply suggest that areas losing service would be within the predicted service areas of other stations. Having stressed the divergence between the predicted contours and actual service resulting from terrain, it believes that PTC cannot contend that the presence of the former demonstrates the existence of the latter. Moreover, if viewed as an experimental operation of limited duration, the petitioners maintain that the public interest is not served by the provision of a new commercial service for the first time to many island residents who will lose it at the conclusion of the research.

18. Whether or not viewed as an experiment, the petitioners maintain that PTC's proposed operation is inconsistent with long-standing Commission policies regarding television allocations and service. They argue that Channel 7 is allocated to serve Ponce as part of the Commission's responsibility to ensure the most efficient technical use of the relatively limited number of channels available for television service. In that regard, Telemundo and others maintain that merely because WLUZ-TV's predicted Grade B contour covers the San Juan and Mayaguez/Aguadilla areas does not entitle PTC to construct full-power facilities serving these communities by separate transmissions. It is argued that the Commission has previously rebuffed other efforts to direct WLUZ-TV service to San Juan at the expense of Ponce, rejecting claims that Puerto Rico should be viewed as one market for television purposes or that the table of allocations should be amended to change channel 7 to a "Ponce-San Juan" allocation. *Channel 7, Puerto Rico*, 58 FCC2d at 1164, 1167. In support of its allegation that the grant of this application will result in a *de facto* reallocation of Channel 7 from Ponce, petitioner WNJX states that it is common knowledge among Puerto Rican broadcasters

that WLUZ-TV has long attempted to become a San Juan station, recording or originating much of WLUZ-TV's programming from studios there that are far better equipped than its studios in Ponce. It asserts that past efforts to make WLUZ-TV a factor in the San Juan market have proved futile simply because the station does not cover that entire market, a fact it believes is not responsible for the station's alleged lack of economic success. It notes that there are successful stations in Mayaguez and Aguadilla which do not cover San Juan and that of the eighteen commercial UHF channels allocated to the island, ten will not cover San Juan, with seven of those presently operating exemplifying those licensees' confidence of success despite lack of coverage to San Juan. WNJX believes that this application proposing an experimental facility is little more than an attempt to transform WLUZ-TV into a "superstation" creating PTC's own network of stations all on the same channel and saturating the three major population centers of Puerto Rico. On the basis of this station's history, the petitioners uniformly contend that PTC now seeks to employ the Commission's experimentation provisions to achieve what it has consistently been unable to accomplish since WLUZ-TV began operating. Further, it is the petitioners' consensus that the grant of this application will undermine the Commission's past concerns regarding service to Ponce and will effectively add an eighth commercial service licensed to serve the San Juan area while reducing the total number of services available to other portions of the island with fewer over-the-air broadcast services and little or no cable television service.

19. In addition to undermining the Commission's existing allocation plan, it is asserted that the operation proposed by PTC will result in a material and adverse disruption of the natural competitive structure that has developed in Puerto Rico. While it is not disputed that the island is in fact marked by rugged terrain, related coverage problems, and a lagging economy, the petitioners maintain that all Puerto Rico broadcasters historically have been faced with these obstacles. Moreover, they have responded to these factors in a manner consistent with Commission rules and policies by employing a variety of facilities improvements, site relocations, extensive translator usage and various affiliation arrangements, thus prompting intense competition for limited resources among the television stations on the island. Here, however, the petitioners argue that the grant of PTC's application will provide WLUZ-TV with a primary transmitter originating station in the three major communities in Puerto Rico and direct access to virtually all significant population centers across the entire island. It is claimed that such a situation will result in WLUZ-TV obtaining an extremely unfair competitive advantage over every other island broadcaster. Moreover, they believe that PTC's proposal represents an immediate and potentially devastating threat to the development of existing and potential UHF stations on the island, fact particularly underscored by the UHF construction permittees participating in this proceeding. Thus, they urge that the development of these new UHF stations in Ponce and throughout the island, viewed in conjunction with PTC's own allegations regarding economic conditions in the market, raise a *prima facie* question of adverse UHF impact which cannot be resolved without a hearing, as was found necessary when PTC last sought to modify its facilities to cover San Juan. *See Ponce Television Corp.*, 33 FCC2d at 947. The petitioners further believe that PTC's application contains only conclusory assertions that WLUZ-TV's alleged lack of coverage has deprived it of audiences and revenues to such a degree that the very existence of the station is now threatened. They assert that PTC's allegations of economic distress are undocumented and particularly inadequate in view of the Commission's 1975 finding rejecting PTC's claim that the economic viability of the station would be jeopardized in the absence of an ability to direct a stronger signal toward the San Juan area. *Channel 7, Puerto Rico*, 58 FCC2d at 1159-60. The petitioners note that in that proceeding while the Commission recognized the magnitude of the station's losses at that time, it was also determined that the "tremendously high level of expenses" in relation to other area television broadcasters indicated that other alternatives were available for improving the station's viability beside permitting it to move or go dark as claimed. Here, the petitioners maintain, the sparse and selective information now presented by PTC fails to permit a conclusion that the station's alleged economic position is the result of factors other than the licensee's financial mismanagement of WLUZ-TV. They assert that further doubt is cast upon PTC's claims of dire financial hardship in light of Malrite's proposed investment of over five million dollars in WLUZ-TV; two million dollars alone to purchase the existing station and over three million dollars to construct the proposed experimental facility for which it can be offered no guarantee of permanent operation. It is suggested that Malrite was aware of the conditions affecting television broadcasting in Puerto Rico when it sought the WLUZ-TV license and, therefore, the Commission should not be forced to approve this application by threats that the station will cease operation or severely curtail service due to alleged financial hardship.

20. Viewed in this light, the petitioners maintain that it would be particularly inappropriate for the Commission to conclude that a VHF station on Channel 7 in Puerto Rico cannot survive without some extraordinary modification of its existing operating authority. Moreover, SFN asserts that if this experimental proposal is approved under these circumstances and difficulties are later found to exist in the system, the Commission will inevitably find itself under considerable pressure not to take any action which would jeopardize the substantial investment and construction already undertaken as well as deprive those members of the public who have been the interim beneficiaries of WLUZ-TV enhanced experimental service. Accordingly, whether viewed as an application for a *bona fide* experiment or as one for a television station operating outside of standard broadcast operation rules and policies, the petitioners strongly urge that for the reasons set forth above, there is no public interest basis to justify the grant of PTC's proposed experimental operation.

21. *PTC's Opposition.* In a consolidated opposition, PTC states that the objections to its proposal are unfounded and, due to the similarity of allegations made, represent a collusive and anticompetitive effort on behalf of entrenched licensees in Puerto Rico, some of whom, along with their predecessors, have attempted for nearly two decades to impede expansion of Channel 7's service area. It argues that the proposed experiment offers genuine promise, for the first time, of applying new state of the art engineering technology to surmount the natural terrain obstacles which prevent Puerto Rico broadcasters from fully serving the island populace. If successful, it claims

that over one million people on the island will receive WLUZ-TV service for the first time. Further, the information gathered on the use of such technologies, PTC states, may well prove beneficial to other television licensees on the island to overcome these natural terrain obstacles. While it acknowledges that, as an experiment, the results of its proposal cannot be precisely assured at this time, PTC represents that the Commission will be kept apprised of the test as it proceeds and will retain the authority to terminate it if unsuccessful. In that regard, it maintains that the experiment to install three co-channel transmitters using terrain shadowing, directional antennas and precise frequency offset in a combination never before attempted, causes no objectionable interference and fully complies with Commission separation requirements with respect to all other broadcast stations in Puerto Rico. PTC asserts that not one petitioner alleges any legitimate harm and that the only party at risk in this novel enterprise is WLUZ-TV itself. It is stated that Malrite is prepared to infuse literally millions of dollars into the station, both in terms of experimental facilities and in upgrading the station's service and programming capabilities, to ensure that service to Ponce will be maintained at present levels and even improved. Accordingly, it urges the Commission to reject the petitioners' claims and to grant its application, permitting it to accomplish what, it claims, it is already authorized to do: serve as many of the residents of Puerto Rico as possible.

22. PTC initially maintains that its application represents a *bona fide* experiment which, employing a combination of technologies never before implemented, offers a reasonable promise of extending actual Channel 7 service to large areas of Puerto Rico which have never previously received it. It rejects the petitioners' contentions that its proposal is not countenanced by Part 74 of the Commission's rules generally governing experimental operations and Section 74.131 specifically relating to such applications. PTC states that its plan is for an experimental facility whose purpose is to determine whether the system will work as expected. PTC has attached to its pleading an engineering study which, it states, outlines a specific and comprehensive technical program of experimentation the results of which will be regularly reported to the Commission. It argues that this analysis effectively refutes the theoretical predictions proffered by the petitioners to attack its proposal. PTC further rejects the claims that it has not adequately demonstrated that its existing facilities and coverage indicate that such experimentation is needed. It recognizes that there have already been numerous scientific studies on the effects of terrain shadowing, permitting approximate calculations of signal path loss over rough terrain. However, PTC maintains that engineers agree that accuracy in determining the precise amount of signal loss is not possible. Therefore, it contends that any analysis of field strengths from the existing WLUZ-TV facility would be of no value in predicting the field strengths from the proposed multiple transmitter system. Similarly, while precise frequency offset is already known to reduce interference from a co-channel facility, the exact amount of reduction depends on the specific number and level of desired and interfering signals at a certain location. Because the field strengths produced by the three separate transmitters cannot exactly be predicted in advance, analysis of the effects of precise frequency offset in this context is of no value when examined only on existing licensed stations. PTC states that the alternative programs the petitioners suggest could be developed around WLUZ-TV's present facility would not provide the information necessary to determine whether the multiple transmitter approach is successful in meeting the desired coverage goals; only by constructing that facility and making measurements based on actual operation can expected service goals be properly evaluated. It contends that the technical analysis contained in its original request for special field test authority, and used to support this application, contains realistic estimates of signal loss over terrain obstacles that should provide the basis for the desired coverage improvements. But precisely because the combined effects of these technologies are impossible to predict in advance, PTC contends that such experimentation is required.

23. PTC disputes the petitioners' allegations that insufficient detail was provided concerning its evaluation of existing service quality and predicted future quality from the multiple-transmiter system. While it does believe that adequate information is provided for the Commission to consider properly the proposal, PTC has offered additional details of its coverage analysis. It states that descriptions of existing service quality at particular locations are based on the experience of observers, together with knowledge of the predicted field strength and pertinent terrain obstructions. In that regard, it points out that the present WLUZ-TV facility has been on the air for many years, with actual coverage having been observed by station employees as well as by consulting engineers. On that basis, present coverage was characterized as either good, fair or poor. PTC states that good coverage would be similar to gradations 1 and 2 of the Television Allocations Study Organization (TASO) scale, where the picture is of high quality and interference such as noice or ghosting is either nonexistent or just perceptible; fair coverage would be similar to TASO 3 or TASO 4, where the picture is acceptable or marginal with somewhat objectionable interference; and poor coverage similar to TASO 5 or TASO 6, where the picture is poor to unwatchable. PTC rejects the suggestion that these gradations of service should have been rated specifically using the TASO scale. It asserts that service qualities were categorized in such broad categories because TASO ratings would have yielded artifically precise results. That degree of precision, PTC believes, as well as the rigorous field evaluations required to determine realistic TASO values, are not necessary to demonstrate the advantages of the multiple-transmitter proposal. In any event, it represents that actual TASO ratings will be determined for both the existing and multiple-transmitter operations during the program of experimentation. As to its consideration of terrain obstructions, PTC states that terrain profiles were plotted from each of the three transmitters to various locations throughout the island. Two such profiles were submitted with its request. PTC disagrees with the suggestion that it is necessary to submit all terrain profiles as the two proffered clearly demonstrate the significance of the terrain obstructions and are representative of terrain conditions in Puerto Rico.

24. With respect to its planned program of research, PTC states that field test measurements of the existing WLUZ-TV facility will be made according to the procedures specified for standard television broadcast stations. See Section 73.686 of the Commission's Rules. When the multiple-transmitter operation begins, field strength measurements will be made using the spectrum analyzer. Accurate measurements to be made of the multiple trans-

mitters are expected, even if all three are operating simultaneously, because each is on a separate offset visual carrier frequency which can easily be resolved by the spectrum analyzer. Both the VHF field strength meter and the spectrum analyzer will be calibrated prior to commencement of the measurement phase of the program and will be checked against each other at frequent intervals. In its zero-scan mode, chart recordings of the desired visual carrier field strength can be made meeting the requirements of Section 73.686. Evaluations of picture quality, as displayed on a video monitor and consumer-quality television set, will be made using the TASO scale, which rank picture quality range from TASO 1 (excellent) to TASO 6 (unusable). PTC asserts that measurements and evaluations will generally be made during the day, under normal programming conditions, with additional tests conducted as deemed necessary during overnight hours using test programming. It rejects the petitioners' suggestions that still scenes must be used as test programming for the results to be valid. Based upon the experience of its consulting engineers, PTC is of the opinion that accurate and repeatable judgements of picture quality can be conducted on regular program material, results that are consistent even when using trained lay personnel.[9] It is argued that these evaluations are at least as valid as judgements based on test slides or other still materials which are not representative of the programming watched by television viewers. Further, because some forms of ghosting are more visible with moving pictures, PTC asserts that such test programming is particularly appropriate as ghosting is expected to be a primary form of picture degradation in the mountainous Puerto Rico terrain. Moreover, PTC rejects the contention that testing be done only at night, stating that such a limitation would prove to be totally impracticable. Because its program consists primarily of field measurements, which require travel to residential and/or rural areas in rugged terrain followed by the assembly of the necessary test equipment and a proper period to conduct its evaluations, PTC contends that, taking into account poor roads, disturbance of residents, the possibility of hitting a power line with its antenna mast and other safety concerns, it would be unwise if not foolhardy, and plainly hazardous to human life and property to conduct these measurements exclusively at night. 25. Although some petitioners question the design of the multiple-transmitter system and the ERPs and antenna heights chosen, PTC states that the facilities proposed were carefully calculated according to several criteria to best meet the desired service objectives. For example, it points out that the South Site, on one of the highest hills in Ponce, was chosen after a lengthy search of available property in that city. The height of its antenna was selected, after consultations with the FAA, as the highest permissible at that location. Due to the smaller geographical area of Ponce compared to that of metropolitan San Juan, the maximum ERP of 316 kW was determined to be unnecessary; because almost no parts of Ponce are shadowed from the antenna, it is anticipated that the proposed 100 kW ERP will provide substantially greater than principal city grade coverage over that city. The South Site directional antenna pattern, which is easily achieved with available state-of-the-art equipment, is designed to provide good coverage to populated areas while minimizing radiation toward areas served by the North Site.[10] As to the North Site, PTC believes that it is the best location to serve the north, northeast and east sections of the island, while remaining shadowed from the south and west. That site, located near Cerro Marquesa, was previously used as a transmitting site for some of the San Juan television stations, until another site was developed for television transmissions due to the fact that Ponce and other southern areas were shadowed from Cerro Marquesa. Because of the large area, which includes hilly terrain, and population to be served, an ERP of 316 kW and a directional pattern designed to minimize radiation in the direction of Ponce was chosen for the North Site facility. Finally, PTC states that West Site was chosen as the best location from which to serve the west coast of the island. The site is on a hill between two major towns, each of which will be provided with unshadowed Channel 7 coverage. PTC maintains that the proposed ERP of 5 kW is great enough to provide sufficient signal coverage to these areas but also low enough to minimize interference to areas served by the other two sites, with the peanut-shaped directional antenna pattern designed to limit radiation in other directions. PTC stresses that the location, ERP, antenna height and pattern of each facility was chosen to serve best its particular coverage sector, while minimizing interference to other areas. Moreover, PTC states that during the course of its experimentation, power levels, as well as other technical aspects of its proposal, may be modified if deemed advisable to better achieve its objective, with any such changes reported to the Commission for its prior approval.

26. PTC also asserts that its proposed multiple-transmitter system, is superior in reducing interference to the co-channel signals than the use of synchronous transmitters as suggested by some of the petitioners. It states that because synchronous transmitters are phase locked to precisely the same frequency, when broadcasting the same program, an improved co-channel protection ratio permits two stations, particularly in the AM radio service, to be located closer together than would otherwise be possible. However, PTC argues that, unlike AM service, if two television stations were on the exact same frequency broadcasting the same program, visual interference resulting from synchronous transmitters would be manifested by ghosting or a second image in addition to the desired image. PTC asserts that the degree of ghosting is relative to the distances between the receiver and the two transmitters, so that its proposed use of multiple offset, rather than synchronous, transmitters is preferred because much less visible co-channel interference will result when the transmitters are precisely offset in frequency.[11]

27. PTC further maintains that it has designed a comprehensive technical program to determine the effectiveness of the proposed system in meeting the desired coverage improvements over its present system. In response to the petitioners' claims that its application does not contain sufficient detail in that regard, PTC has submitted additional information as to its plans to evaluate the performance of the multiple-transmitter system. In addition to the island-wide solicitation of viewer response as to the nature and extent of their reception, a measurement vehicle will be used to analyze signal coverage conditions throughout the island, both for the present WLUZ-TV transmitting facility and for the multiple transmitting system.[12] In that regard, PTC notes that it has never intended to dismantle WLUZ-TV's existing licensed facility during the course of experimentation, keeping it on "standby" operating condition and ready for use throughout that period. Only by comparing existing re-

ception conditions with those resulting from the multiple-transmitter operation, PTC states, can a clear understanding of the new system's effectiveness be learned.

28. PTC next recognizes that the engineering statements submitted by Telemundo and SFN contain lengthy discussions of standard FCC methods of predicting coverage, with extensive calculations of the predicted service and interference areas of the three proposed transmitters, and provide maps depicting the predicted areas for various grades of service. PTC maintains that if the proffered predicted contours were accurate representations of the actual coverage of WLUZ-TV, the station's present signal coverage would be entirely satisfactory and would obviate the need for this type of experimentation. However, it argues that conventional FCC prediction methods do not accurately predict contour distances where terrain in one or more directions departs substantially from the average elevation as it commonly does in Puerto Rico. In fact, PTC states that while the Commission's Rules acknowledge the effect of terrain on VHF signal propagation, they do not specify a method for predicting that effect and allow for a supplemental showing of potential terrain limitations. See Section 73.684. Moreover, it notes that those facts are acknowledged in Telemundo's engineering analysis, wherein detailed studies of the terrain and calculations of propagation loss in numerous signal paths in Puerto Rico were evaluated using two different propagation models, one taken from the National Bureau of Standards Technical Note 101 ("Tech Note 101") and the other from a 1968 report by ESSA Research Laboratories (now the Environmental Research Laboratories of the National Oceanic and Atmospheric Administration). PTC thus asserts that Telemundo's propagation analysis methods are but two of the numerous theoretical models that have been developed and, even still, knowledgable engineers differ on their use and interpretation.

29. As an example of the variety of signal propagation calculations available, PTC discusses at some length Tech Note 101, which it states is widely regarded as an authoritative treatise on such analyses. It asserts that Tech Note 101 is not a single computational algorithm, but rather a collection of algorithms that may be applied in various differing circumstances of, among other factors, signal path lengths, terrain obstructions and atmospheric conditions. Properly viewed, PTC maintains that Tech Note 101 is analogous to a "cookbook with a number of different recipes," with the recipe to be used in each circumstance dependent upon the judgment and intuition of the engineer making the calculation. PTC notes that Telemundo's analysis of existing signal strength incorporates one of the propagation models treated by Tech Note 101, but is only one of the many models which may be useful in predicting signal loss. Further, because of the realities imposed by actual terrain conditions, the propagation model utilized by Telemundo offers no certainty as to its coverage predictions. For example, it points out that the model used by Telemundo ignores the possibility of reflections from the earth's surface between the transmitter and terrain obstacle, and between the obstacle and a receiver. If consideration had been given to such effects, as well as other terrain factors, PTC maintains that calculations made in accordance with some of the other models contained in Tech Note 101 would have yielded markedly different results. In fact, PTC asserts that its propagation studies also rely on a model contained in Tech Note 101, with different assumptions for terrain conditions which it believes are as accurate as the state-of-the-art permits. Further, it states that the proposed multiple-transmitter approach was selected only after thorough analysis of the expected coverage in all places listed in its application and comparisons with other known alternatives for coverage improvement. On that basis, it is expected that the proposed system will perform as intended. However, PTC reiterates, because no single coverage calculation is definitive, it is difficult to determine with certainty which analysis model is closest to reality for any particular signal path subject to severe terrain conditions. Accordingly, it maintains that "the only reliable means of determining the actual performance of the proposed system is to actually construct it and to experimentally test the results." 30. Precisely because conventional coverage predictions are inaccurate in instances of severe terrain such as that in Puerto Rico, PTC contends that the petitioners' calculations of anticipated areas of interference resulting from its proposed operation are similarly irrelevant to consideration of its proposal.[13] It recognizes that the potential interference between the three transmitters would be intolerable under the normal conditions that serve as the basis of the petitioners' allegations. However, PTC reiterates, such normal conditions are not the actual conditions in Puerto Rico; it believes that any meaningful discussion of coverage and interference must take into account the island's mountainous terrain and only by experimentation will actual conditions be determined. Further, PTC argues, it is generally impossible to make improvements in the coverage of a broadcast facility without the loss of service to some areas; no matter how a new location will improve coverage for most viewers, any transmitter move will inevitably cause problems for others. PTC recognizes that there are a few locations, identified in its proposal, that will not benefit from the multiple-transmitter approach. However, PTC contends that the petitioners unduly focus on those few places that will not receive good service as a result of the proposed operation, without regard to the great majority of the population its analyses indicate will have their quality of service improved.[14] While the parties may dispute the degree of service to be provided specific areas of the island, PTC maintains that such disagreement stems from the uncertainty of all available prediction methods and the differences in field strength values and other subjective technical judgments used in such calculations. Moreover, such differences in those calculations and evaluations, according to PTC, point out the compelling need to obtain empirical results from an operating system. In any event, PTC now maintains that those who will lose service as a result of the experimental operation are vastly outnumbered by those who will gain service while the residents of Ponce, the city of license, will continue to receive excellent service from the new facilities. 31. In addition to achieving its goal of determining the extent to which the proposed multiple-transmitter approach is successful in improving Channel 7 service within its predicted Grade B service area, PTC maintains that its experimental program will provide technical information that may prove useful to other broadcast engineers. It states that its analyses of the field strength measurements at the various locations, including comparisons of these values to the predicted fields using different signal path loss models, will provide an improved understanding of terrain shadowing mechanisms that may assist future researchers in this area. Moreover,

because the power and frequency of each transmitter can be adjusted during the experiment and all evaluations of picture quality will be performed under known desired-to-undesired signal ratios and offset conditions, PTC contends that the benefits of precise frequency offset under multiple-transmitter operation will be investigated more extensively than previously possible given recent technological advances. Further, while PTC states that it is willing to accept any requirements concerning its proposed experimental operation and testing that may be imposed by the Commission, it does represent that the Commission will be kept apprised of the testing as it proceeds and it acknowledges the Commission's authority to terminate the project if the experiment is unsuccessul. Nevertheless, it argues that the proposed experiment offers genuine promise of contributing to the technical art of broadcasting and, if successful, may well prove beneficial to other television licensees wishing to surmount the natural terrain obstacles which prevent them from fully serving the island's populace. PTC acknowledges that, at this stage, it cannot conclusively demonstrate that its experiment will prove beneficial to any or many other Puerto Rico broadcasters. However, it believes that the essence of new technology is that it leads to further developments and new understandings. Should the experiment work as proposed, PTC claims that there is no reason why variations of its planned program could not prove valuable in Puerto Rico in particular and television broadcasting in general.

32. With the above in mind, PTC maintains that its application represents a *bona fide* experiment fully consistent with recent FCC decisions. It argues that the petitioners' reliance upon past cases is misplaced and, in any event, those decisions are no longer reflective of the Commission's present view of experimental applications. It points out that in both *Capitol Broadcasting Co. v. F. C. C.* and *WETA*, *supra*, the experimental applications involved were rejected because, among other things, the proposed transmitters were short-spaced and likely to cause objectionable interference to other broadcast stations. PTC disputes some petitioners' claims that the Court of Appeals decided the *Capitol Broadcasting* case on the ground that the experiment was not *bona fide* but, instead, was an application for regular commercial broadcasting. It states that, in fact, the court held that allegations "tending to show" that fact had been made and, given the short spacing and interference to other stations, it was error for the Commission to grant the application without a hearing. PTC also states that in *WETA*, the Commission considered an experimental proposal to substitute Channel 12 for its authorized Channel 26 in an effort to increase coverage to the nation's capital. However, that application was denied because, in addition to the significant short spacing and interference problems to adjacent and co-channel stations that would result, it was determined that the proposal was in direct conflict with a rulemaking proceeding which rejected the allocation of new short-spaced VHF stations as a means of expanding television service.[15] Similarly, PTC observes that in *Eastern Radio Corporation*, 7 RR 837 (1951), the Commission denied an application for an experimental facility the net effect of which was determined to be an attempt to circumvent a freeze on UHF television applications during the pendency of a rulemaking to establish standards for broadcasting on the UHF band. PTC thus asserts that because its proposed experimental operation will cause no objectionable interference to other broadcast stations and implicates no issues that are currently the subject of a pending rulemaking proceeding, none of the concerns raised in *Capital Broadcasting* and *WETA* are present here, while *Eastern Radio* has no relationship to this matter, either on its facts or the law.

33. PTC contends that still more inapposite is the petitioners' reliance on *International Expo Information Broadcasters, Inc.*, 89 FCC2d 1374 (1982), wherein the Commission waived several experimental rules and granted an application for a unique television facility to serve the 1982 World's Fair in Knoxville, Tennessee. In that case, PTC points out that the applicant proposed no new technology in providing service to World's Fair visitors, conceding *inter alia*, that its proposal did not strictly conform to Section 74.131 of the Rules regarding a definite program of experimentation with reasonable promise of substantial contribution to the broadcasting art. Nevertheless, in waiving the rules and granting that application, PTC notes that the Commission observed: The threshold question that arises with any waiver request is not whether the applicant violates a particular rule but rather whether the policy underlying the rule would be circumvented by the waiver. *WAIT Radio v. FCC*, 418 F.2d 1153 (1969). After an examination of Expo's proposal we are persuaded that a grant of the requested waiver would neither circumvent the policies underlying Section 74.102 nor prove a disservice to the public . . . [and will] provide immeasurable public interest benefits. In addition, Expo's proposal will provide the Commission with invaluable information regarding the need for and the feasibility of short term, event-oriented broadcast stations. *Id.* at 1379. Thus, PTC argues that contrary to the petitioners' arguments, " *International Expo* is a clear indication of the Commission's present willingness to encourage experimentation where there is a strong likelihood of substantial public interest benefits." It maintains that the grant of its application "will 'provide immeasurable public interest benefits' by extending WLUZ's coverage to a million or more new persons in Puerto Rico without harming any other station now or in the future . . . [and] 'will provide the Commission with invaluable information' on brand new engineering techniques for television service to Puerto Rico."

34. Further, PTC alleges that the petitioners have ignored the Commission's most recent consideration of experimental applications. In *Satellite Television Corp.*, 91 FCC 2d 953 (1982), *recon. denied sub nom. Direct Broadcast Satellite Service*, 53 RR2d 1637 (1983), *aff'd sub nom. National Association of Broadcasters v. F. C. C.*, 740 F.2d 1190 (D.C. Cir. 1984) (hereinafter " *STC* "), the applicant sought experimental authority to construct America's first multi-channel direct broadcast satellite (DBS) system, supported by audience subscription fees, to deliver television programming. Numerous objections were raised alleging, *inter alia*, that STC was not qualified to build the system; that the proposal was not a valid experiment; that experimental technologies would be employed for commercial purposes; that grant would violate Section 307(b) of the Communications Act, relating to a fair, efficient and equitable distribution of broadcast licenses and frequencies; that parts of the U.S. would not receive service with rural areas in particular effectively unserved; and that grant of the application would have an anticompetitive impact on the industry. Nevertheless, the Commission granted that application concluding, in sum, that the public interest benefits inherent in the new DBS

technology justified favorable action. PTC suggests that the Commission's discussion with respect to the assertions of anticompetitive impact is particularly pertinent to the substantially similar allegations raised here. There, it was stated: The possibility that anticompetitive advantage can be taken is . . . obviated by the size and health of the competitive marketplace any DBS system will enter. We also are un- persuaded by petitioners' fears that STC will have an unfair competitive edge on other applicants by virtue of their early entry in the market . . . The alleged long-term anticompetitive effects of DBS's delivery system can be dealt with, if they arise, in the long term . . . In light of the above, it is again concluded that petitioners have failed to raise any substantial and material questions of fact requiring a hearing under Section 309(e). *Id.* at 981. PTC states that here, as in *STC*, it proposes a new and truly experimental means of bringing service to vast numbers of persons in Puerto Rico who have not previously had the opportunity to receive WLUZ-TV service. It contends that "it would be both unreasonable and unfair, especially given the holding in *STC*, to require WLUZ to forego the broadcast of program material or to refrain from charging advertisers for the programs broadcast," particularly where replacement of its regularly licensed commercial operations is contemplated during the period of experimentation authority. Accordingly, to the extent necessary to permit WLUZ-TV to provide full service during its experiment, PTC requests waiver of Sections 74.182(a) and (b) of the Commission's Rules.

35. PTC rejects these petitioners' arguments that the grant of its application will provide WLUZ-TV with an unfair competitive advantage over all other Puerto Rico television licensees, with particularly adverse impact on UHF stations. PTC argues that, even if the potential for adverse UHF impact was as strong today as it was during the early development of that aspect of television broadcasting, such considerations were never applicable to an existing VHF station seeking better coverage of its already authorized service area. It also challenges the various contentions that its proposal will insulate WLUZ-TV from natural competitive forces and protect it from legitimate competition from other area broadcasters, stating that such allegations confuse geography with competition. It further disputes the petitioners' attempts to discredit the experimental proposal because it would be employed by and for a commercial television station. It reiterates that the Commission has permitted *bona fide* experiments contemplated for commercial purposes, as was done in *STC*, as well as to permit the use of new technologies to bring service to authorized areas previously unreachable. PTC maintains that such experimentation is a highly rationale component of the free-marketplace concept, and that is not inconsistent with the general policies underlying the Commission's experimentation rules for a licensee to conduct genuine research in order to compete more profitably in the marketplace. In that regard, it is stated that Malrite (as transferee of PTC) has no intention of competing unequally in the rigorous Puerto Rico television market as previous licensees of Channel 7, constrained by natural terrain obstacles, have been forced to do. PTC asserts that it is precisely its desire for fair competition which motivated it to seek new engineering technologies to achieve what all Puerto Rico television licensees have desired: actual coverage of the island to match theoretical, but unrealized, coverage predictions. Moreover, if the proposed experiment is successful, PTC states that the petitioners "can anticipate plenty of competition, unhindered by non-economic factors like mountain ranges and the lagging economic climate in Ponce."

36. Contrary to the petitioners' claims that better alternatives exist to increase WLUZ-TV coverage, PTC alleges that the program of experimentation it has designed is expected to result in an improvement of Channel 7 service not otherwise possible. It disputes SFN's claim that the multiple transmitter proposal is essentially a system of VHF boosters, the use of which were looked upon with disfavor by the Commission in 1961. In that regard, it states that a booster is a device that receives an off-air broadcast signal and then retransmits it at a higher power on the same channel, relying on physical isolation between the low-level receiver circuitry and the high-level transmitter circuitry to prevent unwanted oscillations that are potential sources of interference, and requires careful design and supervision to overcome its inherent instability. It notes that a booster, like a translator, has a low power output and is primarily used for the purpose of restoring service to a small area within a station's predicted service contour that does not actually receive service due to terrain obstructions. It states that the multiple-transmitter proposal is not a system of boosters; each transmitter is a separate Channel 7 facility receiving video and audio material via separate studio-to-transmitter links. Moreover, PTC states that in the case of WLUZ-TV, large areas of Puerto Rico within the station's predicted Grade B contour presently do not receive satisfactory service. Even if technically acceptable and permitted by the FCC, PTC maintains that the large number of boosters that would be required could still not effect the same degree of improvement that can be accomplished with even a single full-power transmitter. Similarly, PTC states the large number of low-power repeaters necessary to achieve the expected coverage gains makes the potential use of translators inappropriate and impractical.[16]

37. PTC also rejects the various suggestions that its proposal improperly contemplates a massive expansion of its service into new areas, resulting in an abandonment of its city of license, a *de facto* reallocation of Channel 7, or a "superstation" designed to saturate the major population centers of Puerto Rico.[17] It contends that the proposed program of experimenation is simply designed to maximize *actual* coverage of Puerto Rico within the parameters of its long authorized *theoretical* coverage. Thus, it maintains, the multiple-transmitter approach proposes covering no more area than WLUZ-TV already has the right to serve. In that regard, although precise coverage figures cannot be provided in advance, PTC urges that the substantial ratio of anticipated service gains over losses within its Grade B service area, the continuation of full coverage to its city of license and the lack of short-spacing problems to other stations are factors to be favorably considered given the experimental nature of the three-transmitter proposal.

38. In conclusion, it is stated that both PTC and Malrite have thoroughly explored all practical alternatives for expanding WLUZ-TV's coverage area within authorized parameters and without causing harm to either present or future licensees in Puerto Rico. For the reasons stated above, it claims that not one of those alternatives would have been effective; several would have diminished WLUZ-TV service to Ponce while others were rejected as potentially destructive to other broadcasters. PTC believes that its present proposal, which causes no harm to other

licensees, may present the first viable solution to the traditional coverage problems experienced by all Puerto Rico television stations; although unable to state conclusively that its experiment, in its present form, will prove beneficial to other area broadcasters, it contends that this proposal represents the most realistic and potentially promising alternative yet presented to the Commission. Thus, PTC submits that the numerous benefits to be achieved by its proposed experimental operation indicate that the public interest will be overwhelmingly advanced by the grant of its application.

39. *The Petitioners' Replies.* In response to the consolidated opposition, the petitioners assert that PTC has not adequately addressed the concerns raised with respect to its proposal for experimentation. They contend that although PTC claims to seek authority to do that for which it is entitled, it is not "entitled" to a grant of this application for an experimental facility unless it can demonstrate, not speculate, that such action will serve the public interest considerations underlying Part 74 of the Commission's Rules. In that regard, the petitioners maintain that the purpose of the experimental rules is not merely to expand the reach of a commercial broadcast station, nor does an alleged absence of harm to others warrant the issuance of an experimental authorization. Telecinco, for example, states that the Commission has consistently stressed that an experimental authorization will be issued for the limited purpose of carrying on research and experimentation for the advancement of new broadcast technology, equipment, systems or services, emphasizing that "technological experimentation is still the benchmark of our experimental rules."[19] The petitioners conclude that PTC's opposition pleading, like its application, demonstrates that its proposal is exclusively oriented toward the acquisition of greater revenues by the station's transferee and, therefore, cannot be deemed a valid or necessary experiment under any reasonable or legally sustainable interpretation.

40. The petitioners allege that PTC has failed to address adequately questions raised as to its compliance with the threshold licensing requirements for experimental stations contained in Section 74.131 of the Commission's Rules. They maintain that there is nothing to demonstrate that the proposed experiment will have any scientific value or contribute to the technical art of broadcasting, pointing out that even PTC recognizes that it is not clear that other Puerto Rico broadcasters will derive any benefits or value from such research. SFN suggests that PTC "confuses" the possibility that its experiment might be of use in the specific circumstances it faces as a Ponce station with the obvious meaning of Section 74.131(a)(1) that the proposal provide a promise of contributing to the broadcast art in general. The petitioners further argue that PTC has failed to demonstrate why radio transmissions of any kind, much less commercial programming during regular broadcast hours, is necessary to its program of research or why it should be permitted to retain the exclusive use of the Channel 7 frequency during the experimentation. Moreover, they contend that PTC has failed to show that its experiment can be conducted without massive interference to existing regular broadcast service, rejecting PTC's position that such concerns are somehow obviated by the fact that such objectionable interference will only affect its own transmissions. Without adequately responding to these allegations, as well as others raised in the various petitions and objections, the petitioners believe that PTC has not made the minimum showings for experimental authority required by Section 74.131 and, therefore, its application should be denied. They also state that PTC offers no coherent propagation theory or model of its own to support its assertion that the Commission's engineering standards, and the petitioners' technical allegations, are "completely irrelevant" to consideration of its application. While the petitioners recognize that conventional coverage methods are not infallible, particularly in instances of severe terrain, they assert that that fact does not justify PTC's lack of a proper technical showing using some basis for its anticipated results. Thus, to the extent that PTC claims that its experiment is justified because the precise effects of its proposed operation cannot be determined in advance, the petitioners urge the Commission to reject PTC's own failure to supply adequate information as the rationale for granting its application. Further, while they agree that, in general, the effects of severe terrain conditions on conventional coverage prediction methods may be an appropriate subject for study and review, the petitioners contend that PTC's program of research cannot hope to yield scientifically useful results upon which the Commission's existing prediction methods could be evaluated or new prediction techniques established. In that regard, they allege that even by supplementing its viewers' responses with one truck containing one receiver taking an unspecified number of measurements at an unstated number of locations without any proposed analysis of the field conditions in which such readings are taken or even the nature of the terrain obstructions the experiment is supposedly designed to test, PTC is ill equipped to conduct such an extensive program of research.

41. Even assuming that PTC cannot employ alternative methods for increasing WLUZ-TV coverage or conducting its experiment on facilities other than those applied for,[20] the petitioners contend that those facts do not justify the carriage of regular commercial programming on the proposed experimental station. They assert that PTC's apparent abandonment of viewer solicitations as the primary source of its data makes clear that there is no need to conduct the experiment with regular commercial broadcasting, further undermining the basis upon which such a waiver of the experimentation rules is sought. They also maintain that PTC must still demonstrate, at a minimum, that the proposed tests could not, as suggested by numerous petitioners, be conducted during WLUZ-TV's nonbroadcast hours and, even if necessary, on a limited waiver basis permitting temporary interruptions of regular broadcast service while tests are conducted. In its pleading, Western suggests that a separate but equally serious shortcoming in PTC's submissions concerns its assumption that continued operation of its present facility must be discontinued in order for any experimentation of the multiple-transmitter system to work. While it believes that PTC did respond with "commendable sensitivity" to the impracticalities of conducting its experimentation during nighttime hours, Western nevertheless contends that such concerns for the safety of the research personnel does not preclude the necessity of gathering such information in compliance with Section 74.182 of the Rules.[21] Further, the petitioners allege the availability of pre-sign-on hours to conduct any necessary testing would prevent WLUZ-TV's viewers from becoming "non-consenting participatory guinea pigs" in PTC's untried multiple-transmitter concept. With such alternative methods for testing available, they argue, the public could

continue to receive current WLUZ-TV service while PTC could make any required adjustments to its operation only after the Commission analyzes the collected research data to determine whether the public will indeed be better served by a multiple-transmitter system than by conventional transmission modes in areas of uneven terrain such as Puerto Rico. If and when such a Commission decision is made, the new service would then be equally available to all without having given PTC the benefit of a substantial competitive headstart.

42. Although PTC states that it will keep its presently authorized facilities on standby status, permitting the resumption of regular broadcast service should the Commission ultimately order termination of the experiment, the petitioners maintain that that fact does not adequately address the policies and concerns underlying the experimentation rules.[22] For example, Western contends that the policies disfavoring the transmission of program material and prohibiting commercial charges are intended to protect the viewing public from disruption of service from an experimental station should the authority to operate it be terminated. That same rationale, it suggests, compels denial of PTC's request for waiver of Section 74.182 to permit regular commercial service on the proposed experimental station. It believes that the public interest is not served by waiving the experimental rules to permit the provision of a new service to many areas of Puerto Rico that may shortly be lost. In that regard, SFN notes that, PTC's claims to the contrary, this "proposal will not 'restore' anything: the fact is that the proposal will extend the station's service to areas which have *never* received it."

43. The petitioners contend that PTC itself does not dispute that its proposal could not be authorized under the Commission's Table of Assignments or that its transmitters are short spaced and likely to cause objectionable interference. Nor does PTC challenge the engineering and policy considerations underlying the Commission's spacing requirements or the fact that the Commission has considered and rejected reliance upon terrain shielding and precision offset in numerous other proceedings. They argue that PTC's repeated claims that the experimental proposal risks harm only to itself ignores the fact that the public will be harmed if it is deprived of the station's service, asserting that PTC is not licensed to serve itself, but rather, the public.[23] Moreover, it is stated that long-standing Commission rules and precedent make clear that a station is not "entitled" to modify its service area in an effort to serve new areas at the expense of existing areas of service.[24] Thus, Telemundo contends that PTC's utter failure, even under its own analysis, to reasonably identify the number or location of persons that can be expected to use service under its proposed operation compels denial of this application and, in any event, further underscores why PTC should employ alternative methods, particularly testing during non-broadcast hours, to conduct any desired research.

44. The petitioners maintain that PTC's interpretations and reliance upon past Commission cases are not only incorrect, but further underscore the weaknesses in the proposal. While PTC claims that in *Capitol Broadcasting Co. v. F. C. C.*, *supra*, the Court of Appeals rejected the subject application on the basis of the short spacing and interference to be caused to other broadcast stations, the petitioners argue that that interpretation fails to comport with the plain implication of the Court's holding; that is, that an application which attempts to use the Commission's experimental rules for financial gain cannot be considered a *bona fide* experiment. It is argued that PTC's efforts to distinguish the *WETA* case from its own proposal on similar grounds is equally unavailing and simply does not address the central point of that case; that is, that the Commission will not permit its allocations and transmitter separation rules to be evaded under the guise of "experimentation." It is pointed out that in *WETA*, the Commission found the applicant's measurement program too limited and ill-defined for the undertaking proposed; that no need had been shown for field tests; or that, given the number of variables to be interpreted, the results of the field tests would be reliable. *WETA*, *supra* at 917-18. The petitioners urge that these same conclusions apply with even greater force to the minimal proposal for measuring PTC's system set forth in its opposition pleading.[25] While acknowledging the validity of the short-spacing and interference considerations that were found to warrant denial of the *Capitol Broadcasting* and *WETA* applications, the petitioners allege that PTC has not seriously addressed the adverse consequences of its own proposal to the public interest nor substantiated its claim that the public as a whole will enjoy enhanced service as a result of the grant of its application.

45. The petitioners further contend that, contrary to PTC's assertions, *International Expo* does not support its claim that technological experimentation and prohibitions against programming charges are no longer important to the Commission's view of experimental applications. They reiterate that the Commission has emphasized that "technological experimentation [remains] the benchmark of our experimentation rules," noting that one of the purposes of the rules prohibiting experimental licensees from charging for their services "is to screen out those applicants motivated by self-aggrandizement." 89 FCC2d at 1378, 1383. In any event, they argue that in *International Expo*, the Commission waived its rules on technological experimentation and programming charges for reasons totally inapplicable to PTC's proposal. First, that applicant had not sought authority to conduct technological experimentation, but instead proposed to construct and operate a station very unlike any conventional broadcast service, in that it would be devoted exclusively to coverage of the Knoxville World's Fair for several months. Thus, the Commission was able to conclude that the proposal would provide "invaluable information regarding the need for and the feasibility of short-term, event-oriented broadcast stations." *Id.* at 1379.[26] Second, while the applicant was allowed to collect charges for promotional announcements, the petitioners maintain that the Commission did so only because the experimental licensee was a non-profit organization which pledged to donate all profits from its operation to charity. These factors, it was found, ruled out the possibility that the applicant was "motivated by self-aggrandizement." In contrast, the petitioners allege that PTC's proposed experimental operation is indistinguishable from conventional broadcast operations; its clear intent to operate such a facility on a permanent basis is evidenced by the fact that its proposal does not involve experimentation into a new kind of television service and PTC's concession that its motives are to enhance WLUZ-TV's own profitability. Thus, Telemundo claims, "PTC does not even seek a waiver of the Commission's technological experimentation requirement nor could it justify such a waiver under *International Expo* if it did."

46. With regard to its reliance on the Commission's holding in the *STC* case, the petitioners claim that PTC's interpretation is equally misplaced, seizing upon purely superficial and incidential similarities while ignoring substantive differences. They allege that the Commission's action in *STC* authorizing the nation' first commercial multi-channel DBS system was taken in the context of a large and healthy competitive marketplace, whereas PTC often refers to the "increasingly depressed community of Ponce" and the fact that "much of the island is economically depressed" in an attempt to justify the need for exploring alternative methods to increase WLUZ-TV coverage. Moreover, they maintain that PTC's arguments exclude the following facts underlying the *STC* decision: that other applicants for interim authorizations were being solicited and accepted from other interested parties, affirming an equal opportunity for all to enter that market; that these procedures were the result of a Report and Order after Notice of Proposed Policy Statement and Rule Making to consider policies and rules to govern a new general service to the public; and that these interim procedures were the result of a flexible regulatory approach prior to the adoption of a permanent regulatory scheme and patterned in accordance with Part 5 of the Commission's Rules (Sections 5.1 *et seq.*, relating to experimental services other than broadcast)[27] and the "open entry" policy successfully used in the domestic satellite field. 90 FCC2d at 708. They state that none of these elements underlying the *STC* case are present in the PTC proposal; *i. e.*, "no new general service, no equal opportunity and open entry for all, no prior rule making proceeding with a resulting report and order to establish ground rules, etc., and *no language whatever* dealing with Section 74.182(a) and (b) or the waiver thereof, which is necessary to the experimental broadcast authorization being sought by WLUZ." Not only is the Commission's holding in *STC* inapposite to the case at hand, according to the petitioners, the rationale underlying that decision "exposes the WLUZ proposal for what it is: a plan to circumvent the restrictions of Section 74.182 with no valid ground for waiver presented."

47. Thus, the petitioners conclude that PTC has not adequately addressed the concerns raised with respect to the experimental proposal nor established an appropriate basis to conclude that the public interest will be served by the grant of this application. They reject PTC's suggestion that the Puerto Rico broadcasters participating in this proceeding are acting collusively to protect the status quo or otherwise maintain an entrenched competitive superiority over WLUZ-TV. Instead, they urge that the similarities in the objections raised to the PTC application reasonably reflect the obvious concerns with the inadequate and potentially disruptive program proposed. Although PTC claims that it is merely seeking to expand coverage into areas to which it is entitled to serve, the petitioners uniformly believe that it is not "entitled" to a grant of this application unless it can be demonstrated, not speculated, that such an action will serve the public interest. The petitioners submit that PTC's unsupported claims of financial hardship or that WLUZ-TV will be forced to go dark in the event such a modification is not allowed are unpersuasive, irrelevant and, in any event, fall substantially short of the burden to be met by applicants for experimental authorizations pursuant to Part 74 of the Commission's Rules.

## DISCUSSION

48. *The Basis for Experimentation.* Reduced to its essence, PTC seeks experimental authority to determine if a system of multiple closely spaced co-channel transmitters can provide significantly better service than a single standard transmitter, in an area of extreme terrain variations. The experimental system as proposed is subject to the constraints that it not extend service outside the area the licensee is normally entitled (expected) to serve, that it not preclude other service, and that it not cause interference. Before turning to the merits of that application, we must address the threshold question as to whether the subject matter of that proposed research forms proper and valid basis for experimentation under Part 74 of the Commission's Rules. In that regard, we believe it helpful to note initially that the parties here do not dispute that conventionally accepted methods for predicting signal coverage are inaccurate and unreliable when subject to severe terrain conditions such as that exemplified by Puerto Rico's topography. Indeed, the Commission has recognized that actual over-the-air coverage of television stations in Puerto Rico may be significantly more limited than the coverage indicated by calculated Grade A and B contours. *See Zaida Perez Vda. de Perez Perry*, FCC 85-381, released July 26, 1985, at paragraph 11. There we observed:

> The upshot of [the fact that Puerto Rico's terrain is rugged, with a central mass essentially dividing the island into northern and southern portions except at the ends] . . . is that useful television service from any given station is limited, usually not extending beyond the Grade A contour and sometimes not being satisfactory within that contour.[27]

*See also, Channel 7, Puerto Rico*, 58 FCC2d at 1151. Nor are such coverage problems limited to the severe terrain in Puerto Rico. *See, e.g., Blair Broadcasting of California (KSBW - TV )*, 55 RR2d 619 (1984).

49. In fact, consideration of the effects of terrain on signal coverage and interference prediction methods in general has remained an ambiguous area. When the Commission adopted the signal propagation models contained in Part 73 of the Rules, it chose not to take advantage of several recognized methods to place stations more closely together. *See Sixth Report and Order (Television Assignments )*, 41 FCC 148, 180-83 (1952). As the petitioner correctly observe, the Commission chose instead to reserve such possibilities as "safety factors" to prevent large amounts of unexpected interference. *Id.* However, it was also recognized at that time that those "propagation charts are sufficient to afford an adequate basis for describing field intensities *under average conditions*, but it is expected that there may be substantial variations in individual areas." (Emphasis added, *id.* at 173, quoting *Third Notice of Proposed Rule Making*, FCC 51-244, released March 21, 1951.) In the 1980 *Notice of Proposed Rule Making (Table of Television Allotments )*, *supra*, the Commission observed that those signal propagation models, developed without taking into account the effects of such factors as terrain shielding and precision offset, had proved to yield reasonably accurate predictions of service area. 83 FCC 2d at 85. Further, the Commission stated that "only the terrain shielding effect is not yet amenable to precise quantification, and therefore not available as a tool to configure more efficiently the placement of VHF station allotments." *Id.* That fact is reflected in Section 73.684(

of the Commission's Rules for predicting coverage, which permits an applicant to supplement contour showings based on normal prediction methods in cases where terrain may be expected to affect the practical limit of service. Thus, we believe that, because present models to predict the impact of severe terrain conditions yield results that are so uncertain, it is apparent that re-examination of those coverage prediction methods can be useful. Further, we conclude that such experimentation into the effects of severe terrain conditions on signal propagation, particularly in isolated areas, holds a reasonable promise of substantial contribution to the development of the broadcasting art.

50. *The Program of Research.* We are not persuaded by the petitioners' claims that PTC's proposal lacks adequate technical information to demonstrate the need for such experimentation in the manner proposed. While we are unable to agree completely with all the conclusions reached by PTC regarding its present service, we nevertheless observe the general agreement of all parties to this proceeding that the mountainous terrain of Puerto Rico results in substantial signal obstruction for most, if not all, island broadcasters. We also note the general consensus that conclusive determinations of the precise effects of severe terrain remain, at this point, largely theoretical due to the host of differing factors to be employed in any given propagation model, about which knowledgeable engineers can reasonably differ. Such disagreement is evidenced by the differing assumptions made and conclusions reached in the various engineering studies submitted by the parties; in fact, questions could be raised concerning any reasonable analysis used to support a theory for predicting the effects of terrain in this context.

51. On the basis of the allegations and materials before us, we do not believe that a substantial and material question has been raised with respect to PTC's ability to proceed immediately with its program of research and experimentation or that such research will be conducted by qualified personnel. The petitioners' allegations concerning the lack of comprehensive technical precision in PTC's assessment of present WLUZ-TV signal coverage fails to indicate that it will be unable to conduct the proposed research in such a manner. As set forth in paragraph 24, *supra*, PTC has set forth a reasonable basis for the methodologies it will use to determine both its existing and proposed multiple-transmitter service during the experimentation. There is no reason to assume, on the basis of our present knowledge of terrain limitations, that PTC is technically unable to gather the information necessary to evaluate properly the efficacy of a multiple-transmitter approach to overcome television signal obstruction. In any event, if the need for further or alternative testing becomes apparent, as determined by the Commission, Malrite has pledged to take appropriate measures to ensure that its experimentation meets the desired objectives. Moreover, there is no basis to conclude that those supervising the research are unqualified or otherwise cannot be relied upon to conduct a professional program of experimentation, subject to modification as determined to be necessary during the course of its studies, and supplemented by viewer response to the experimental service. Further, while we do not expect PTC to subject its research personnel to any unnecessary dangers during the course of the experiment, we do anticipate, particularly in light of the supervising engineer's past experience with broadcasting in Puerto Rico, that all necessary testing and field measurements, including those which must be conducted during nighttime hours, will be implemented in a manner consistent with the intended goals of this experiment.

52. Although it is correctly observed that the use of directional antennas, natural terrain shielding and precise frequency offset are not unique, we believe their integration into the proposed multiple-transmitter system presents a novel opportunity to gather information regarding the feasibility of increasing actual signal reception to areas marked by extreme terrain. In fact, while it is true that these engineering concepts have individually been questioned as allocation tools or substitutes for the spacing requirements under Part 73 of the Rules for conventional broadcast operations, we do not view those past discussions as conclusive with respect to the experimental proposal we are now considering for use in this specific case. For example, in the *WETA* case, one of the purposes of the proposed experiment was to evaluate the effect of precise frequency control, directionalized antennas and signal suppression to provide reduced interference between co-channel stations and its potential for use as an allocation tool in proceedings involving the short spacing of VHF television stations. It was argued at that time that the need for additional information was warranted because previous studies had not produced all the needed information on allocations, interference ratios and precision offset. Moreover, the Commission agreed with the applicant, stating: "We do not quarrel with the need for additional information, but we do question whether the proposed program, which does not have nearly the scope and manpower of [previous studies], . . . can realistically be expected to make a contribution to the state of the art." *Id.* at 918. The Commission concluded, among other things, that the proposal failed to set forth a final design of a method to measure the results of its testing and that the applicant failed to establish that it was necessary to construct the proposed experimental station in order to obtain the desired information. However, that does not lead us to now conclude that more information on interference ratios and allocations, in combination with other technological advances, would be any less helpful to address the short spacing concerns raised in *WETA*, as well as the effects of severe terrain conditions present here. Further, in *Report and Order* (*VHF TV Top 100 Markets* ), *supra*., the Commission assigned four new VHF television allocations despite the recognition that there would be increased interference to viewers within and beyond the Grade B contours of existing stations affected by the "drop-ins." That action was taken in response to a petition for rulemaking and did not involve any request for experimental authority. However, on the question of terrain shielding as a method of predicting interference, it was found that the record in that proceeding contained studies of automated terrain correction computer programs based on models that were still developmental and needed further field measurements.[28] Nevertheless, the Commission ultimately determined that the benefits to be achieved by additional service opportunities on the new channels outweighed the claimed losses resulting from interference and adverse economic impact, which were found to be, to some extent, speculative. 81 FCC2d at 252-53.[29] Thus, although consideration of terrain obstructions was rejected for use in allocating the new drop-in stations, pursuant to Part 73, due to the

unreliability of the information, we believe the discussion of that subject underscores the usefulness of obtaining such terrain information.

53. Because PTC seeks to develop realistic methods to overcome natural terrain limitations on signal propagation, we are not persuaded by the petitioners' assertions that other existing television stations utilizing precision offset and directionalized antennas are available to achieve the same results without a grant of this experimental authority. Though PTC will employ certain established technologies as part of its research, its proposed experiment is not limited to mere consideration of these individual technical factors. PTC expects that its experimentation will yield new and necessary information on how these technologies, as well as others, can be best utilized in various combinations to develop a viable approach to compensate for terrain obstructions to television signals and we can reasonably expect that new data of general application will be gathered. Similarly, while the petitioners suggest that the precise effects of terrain can be learned by studying existing WLUZ-TV service, that is only one aspect of the program of research to be undertaken by PTC. As discussed above, it is not necessary, at this juncture, for PTC to demonstrate conclusively all instances of terrain limitations to existing WLUZ-TV reception in order to establish the need for this type of research. However, PTC's objective in conducting the proposed experiment is not to document present signal shortcomings in and of themselves, but to seek appropriate technological alternatives and methods to overcome such shortcomings. In order to determine any effective means to address the problem of terrain obstructions to television signals, PTC will be required, as it acknowledges, to conduct a comprehensive analysis of not only its existing service, but also the signals broadcast over the experimental facilities. Accordingly, on the basis of the nature of the research to be conducted, we believe that the transmission of broadcast signals is essential to the proposed program of experimentation, as required by Section 74.131(a)(3) of the Rules.

54. As to the proposed use of a multiple-transmitter system to conduct the testing, we are unable to agree that such an approach essentially comprises a system of VHF signal boosters. Further, we do not believe that the considerations underlying the Commission's 1961 rejection of the use of such boosters even apply to the case at hand.[30] That decision was based on the fact that VHF, as opposed to UHF, signal boosters were inherently unstable electrically using equipment available at that time. Because the VHF frequency band was more congested than the UHF band, it was concluded that this instability could cause boosters to radiate signals outside their assigned channels causing interference to both television stations and other services using the VHF spectrum. 26 Fed. Reg. at 4523.[31] In any event, the reasoning underlying the Commission's 1961 action regarding boosters and congested use of unrelated frequencies are not relevant to the request now before us. PTC proposes the use of transmitters that are type accepted for Part 73 operation and, therefore, meet established stability and out-of-band emission requirements. Individually, each of the proposed facilities complies with the full-service television (Part 73) rules that govern interference. Taken together, the only potential interference we expect the three facilities to cause is to to each other.

55. *The Broadcast of Commercial Matter.* PTC's proposal presents a case of first impression in that it proposes to substitute the presently authorized conventional WLUZ-TV service with that of the experimental service for the duration of its testing and research.[32] As such, PTC seeks appropriate authority to provide regular WLUZ-TV program service, including commercial matter for which it will receive advertising charges, on the experimental station. Section 74.182(a), governing program service and charges on experimental stations, provides program material may be transmitted "only when necessary to the experiments being conducted" and no regular program service may be broadcast "unless specifically authorized." As to the transmission of program material, we are unable to agree with the petitioners that, for the purposes of this experiment, it would be more effective for PTC to broadcast and study non-program matter such as unmodulated carriers, pulses, tones or test patterns. Inasmuch as the proposed research is aimed at developing methods to overcome the effects of severe terrain obstructions on signal propagation, certain significant instances of interference, such as multi-path and shadowing, would be less readily detected broadcasting still pictures or other non-program materials than would be the case using continuous programming. As noted earlier, PTC must, of necessity, conduct comprehensive analyses of both its present and proposed operations in order to develop methods to overcome terrain obstructions. We agree with PTC that viewer response is an important part of this experiment and the use of still pictures or test patterns will not assist in obtaining that information or providing a meaningful comparison of existing service and the signals broadcast over the experimental facilities. Moreover, the same holds true for the petitioners' suggestions that testing be confined to certain dayparts or limited to nonbroadcast periods. In order to obtain valid measurements and significant viewer input on the ongoing viability of this type of system, we conclude that the transmission of continuous program material in the manner proposed is necessary to the experiment being conducted and is, therefore, consistent with that aspect of Section 74.182(a). Further, while the broadcast of regular program material is "necessary to the experiment being conducted" and is essential to the decision of whether to "specifically authorize" such programming pursuant to Section 74.182(a), we also believe that the grant of such authority will serve the public interest considerations underlying the Commission's Rules in general and its experimental rules in particular. As a substitute for present WLUZ-TV service, PTC's proposal will avoid the disadvantages of discontinuing Channel 7 service to all of WLUZ-TV's viewers during the course of its experimentation or conducting its research on another frequency better used for conventional broadcasting purposes. Further, we do anticipate that all necessary testing and field measurements, including those which must be conducted both during the day and the night, will facilitate the intended objectives of this experiment. Thus, on the basis of the materials presently before us in this matter, we believe that there is no public interest basis to reject PTC's proposed use of regular WLUZ-TV programming.

56. We next turn to PTC's request for waiver of Section 74.182(b) of the Rules to permit it to charge advertisers for materials broadcast as part of the regular programming to be offered on the station during the period of experimentation. The petitioners, arguing that the requested waiver indicates that PTC intends to receive fi

ancial gain from its operation of the experimental acilities, assert that such a waiver would be contrary to oth the purpose and spirit of the experimental rules nsofar as Section 74.182(b) assures that those genuinely nterested in experimentation, and not financial reward, ill be licensed. While we agree that one of the functions f Section 74.182 is to screen out those applicants motivated primarily by profit, examination of the petitioners' llegations fails to persuade us that that is the primary urpose underlying PTC's application for experimental uthority. Moreover, we believe that the facts and circumstances here are readily applicable to the considerations underlying the grant of a similar waiver in *International Expo, supra*. In that case, in order to operate financially independent short-term experimental televiion operation to serve the 1982 World's Fair, the applicant, a non-profit organization, sought waiver of ection 74.182(b) so that it could receive money for on-air identifications, using such funds to offset expenditures and pledging to donate any profits to charity. Under those circumstances, the Commission did not believe that the applicant was seeking to profit monetarily om the proposed venture and granted the waiver, noting at adequate safeguards were present to assure that any buses could be addressed. 89 FCC 2d at 1383. In the case hand, the proposed charging of fees for commercial atters is not intended to support the operation of a new perimental service but, rather, to sustain an existing mmercial television service which WLUZ-TV remains bligated to provide regardless of the results of this exrimentation and research. It is true that if this program research is successful in developing methods to overme the effects of extreme terrain conditions on televion signal reception, PTC, as well as other similarly uated licensees, could increase actual signal coverage to e point of increasing the financial strength of such ations. However, because the intended results of its search are by no means guaranteed, it is equally true at after committing significant sums of money, time and rsonnel to keep its presently authorized facilities on tand-by" status while gathering valuable technical inrmation to gain greater insight into terrain limitations, TC may be unable to implement successfully the results its research for WLUZ-TV on any ongoing basis.[33] hus, we find that the petitioners' allegations that PTC eks financial gain from the operation of the experimenl facilities at the expense of a *bona fide* program of search to be largely speculative and conclusory.

57. However, with respect to the question of whether TC should be permitted to charge for advertising on LUZ-TV during the period of experimentation, we note at a waiver of Section 74.182(b) can only be justified if, er careful evaluation of the arguments presented and a ighing of the policies involved, it can be determined at the public interest, beyond PTC's private interests, ill be served by that action. *See WAIT Radio v. F. C. C.*, *pra* at 1157. As noted above, there is no basis to assume at PTC's motivation is to operate the proposed experintal facility for additional profit. While PTC, as well as hers, may eventually realize an improved financial and mpetitive position if the experiment successfully yields tter signal coverage methods in instances of severe rain, that is by no means certain. Thus, to the extent at Section 74.182(b) seeks to screen out those applicants otivated primarily by profit, such concerns are not esent here. On the other hand, having found that this periment as proposed holds the potential for contributing to the broadcasting art and improving service to isolated areas marked by extreme terrain obstructions, without the disadvantages of discontinuing present service or unnecessarily wasting valuable spectrum space, we have a significant interest in assuring that a viable Channel 7 service be provided both during the course of the experiment and after its conclusion. In this regard, it is important to note that this conclusion is not based on the dire predictions of WLUZ-TV's financial viability proffered by Malrite's predecessor to the station's license; in fact, we neither accept nor address those financial allegations in this context because such concerns: (a) are obviated by Malrite's unchallenged pledge to continue to operate WLUZ-TV's service at the conclusion or termination of the experimental authority; and (b) do not form the basis of a decision whether to license the proposed facility for purposes of the experimentation. Again, the provision of regular WLUZ-TV programming over the experimental facility serves the public interest by facilitating valuable viewer response during the period of research and assuring continued Channel 7 service both over the course of the experiment and at such time that regular broadcast operations resume. Accordingly, insofar as the requested waiver will neither circumvent the policies underlying Section 74.182(b) nor prove a disservice to the public, it will be granted.

58. *Interference and the Effect on Existing Service.* For substantially similar reasons, we believe waiver of Section 74.131(c) of the Rules, with regard to interference, is appropriate and in the public interest.[34] It is undisputed that certain gains and losses of WLUZ-TV reception will be occasioned by this proposed operation. Due to the topography in Puerto Rico, however, any analysis of the precise gains and losses of service is difficult to forecast, and that is but one of the reasons that PTC's research can provide valuable information to advance the technical art of broadcasting.[35] However, because the proposed program of experimentation is designed to analyze and overcome the effects of severe terrain variations on television signal reception, it is absolutely necessary to study the varied instances and degrees of resulting interference. As is evident from Commission precedent in this area, "there are subtle distinctions in the uses of the term 'experimental'",[36] requiring a flexible approach, unrestrained by the conventional aspects of broadcasting, to determine whether each individual proposal indicates the ability to generate the solid and valued data and experience where additional insight into particular aspects of broadcasting is necessary for either technical or nontechnical (*i. e.*, such as the need for service) reasons. In assessing the particular instances of service gains and losses to be occasioned by this proposal for purposes of this program of experimentation, we are not constrained by the limitations on interference specified in Part 73. As such, if this proposal were for regular broadcast operation, the interference resulting from the short-spaced transmitters would be of critical importance, as was the case when the Foundation sought waiver of Section 73.610 of the Rules. See paragraph 12, *supra*. However, with respect to PTC's request for waiver of Section 74.131(c) of the Rules, we believe that the policies favoring *bona fide* experimentation justify deviation from the general prohibitions of that rule, and will not frustrate its underlying objectives. The island of Puerto Rico, with its wide variety of topographic conditions, provides an optimal testing ground for studying the particular effects of, and developing ways to overcome, many widely varying

terrain features on signal reception in relatively isolated areas. Although not bound by Part 73 of the Rules, in structuring its proposal to best achieve the desired results, PTC has demonstrated sensitivity both to the technical considerations underlying conventional broadcast standards and the potential disruption of existing broadcast operations on the islands. The petitioners are correct in observing that for conventional broadcast operations, the fact that a station would cause objectionable interference only to its own signal would not alone justify deviation from the transmitter spacing requirements of Section 73.610. However, in order to analyze the many different degrees of signal interference in isolated areas, explore methods of minimizing or eliminating those problems and ultimately improve service to such locations, we believe that it is significant that such objectionable interference not adversely affect or disrupt other signal reception. Further, so long as WLUZ-TV provides adequate signal coverage to its principal community of license, we conclude that viewers in those areas beyond Ponce that may experience temporary interruption or diminished reception of WLUZ-TV service as a result of the experimental operation, have a significantly greater interest in encouraging any and all practical methods to improve signal reception under these conditions, which, at present, may already be unsatisfactory. *See, e. g., Zaida Perez Vda. de Perez Perry, supra.* While we recognize that the grant of this experimental authority could result in some degradation of Channel 7 signals received by some viewers, we nevertheless believe that the petitioners' conclusions regarding service loss are largely speculative and unconvincing. On the basis of the design of the experimental system, it appears likely that overall service gains within WLUZ-TV's present predicted Grade B contour will outweigh the losses. Moreover, in view of the substantial service improvements that can be achieved as a result of the proposed research, we believe that the anticipated minimal service loss is more than compensated by the expected service gains.[37] We emphasize, however, that we view the issue of interference to existing service as a matter of very significant public interest concern. Further, we again reiterate that any service degradation or interruption will be temporary and minimal due to the nature of the experimental authority and our ability to cancel that authority if circumstances warrant. In reaching this conclusion, it is important to note that PTC itself has a major incentive to minimize objectionable interference, both for purposes of this research and in order to avoid adverse reaction from its viewing audience. Further, as the course of study progresses, we may place further conditions and requirements for testing as appropriate to ensure that any possible threat to the overall public interest considerations is minimized.[38] For these reasons we find that the substantial benefits to be gained from the program of research now proposed, when balanced against the temporary and, in any event, largely speculative detriment that may occur, warrant the conclusion that waiver of Section 74.131(c) under these circumstances is appropriate and in the public interest.

59. *The Exclusive Use of the Channel 7 Frequency.* We are not convinced that the petitioners' allegations regarding the prohibition on the exclusive use of any frequency for experimentation requires rejection of this application. While as a general matter, Section 74.131(b) states that "a license of an experimental broadcast station will not authorize exclusive use of any frequency," we are also mindful that:

> [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged by the public interest.[39]

Under the circumstances now before us, we agree with the applicant that authorization of this proposal will not preclude the use of the subject frequency to a greater extent than is already the case by virtue of WLUZ-TV's present authority to operate a full-service broadcast station on Channel 7 in Ponce. Accordingly, because a grant of this application will not remove the availability of any additional frequency for use in Puerto Rico, we conclude that the concerns underlying Section 74.131(b) are not present here.[40] Further, because the proposed experimental station will not require the use of any additional spectrum space, we are not persuaded that the application should be treated similarly to one for a new television broadcast service which, once reviewed for basic acceptability, appears on a cut-off list subject to competing applications. In that regard, the Commission's decision in *International Expo* is instructive. There, we observed that experimental applicants should not be held to the same standards as conventional broadcast applicants since the nature of the services and the policies they promote are significantly different. With applications for conventional television stations, placement on a cut-off list informs the public that the application has been filed and gives other prospective applicants an opportunity to file competing applications. Although the Commission is always concerned that an applicant is qualified to build its station, that concern is heightened when there is more than one applicant for a given channel.[41] However, as recognized in *International Expo*, Unlike conventional broadcast station authorizations, there has never been a great clamor for experimental authorizations. In fact, the Commission is unaware of a single instance of more than one experimental applicant applying for the same channel. Further, it is doubtful that experimental applications could be mutually exclusive, since the Commission could authorize both applications on different frequencies, or authorize both applicants to share time. See, Sections 74.112(c) and 74.112(b) of our Rules. 89 FCC2d at 1386. Moreover, the Commission found the different nature of the two services as a further reason for not extending the conventional broadcast processing standards to experimental applications. Unlike conventional television and radio stations which are licensed for a period of five and seven years, experimental stations are licensed for a much shorter period of time and are authorized for the limited purpose of conducting the specific program of experimentation. Generally, licenses for experimental facilities are issued for a one-year period pursuant to Section 74.15(a) and are subject to cancellation at any time without notice or hearing pursuant to Section 74.112(e). However, our evaluation of this proposal indicates that the public interest will be served by permitting this applicant a two-year period of on-air experimental broadcast operations. To the extent necessary, therefore, we will waive that part of Section 74.15(a) of the Rules. Further, such an action in no way lessens our ability to terminate this authority if circumstances warrant.

60. *Competition, UHF Impact and De Facto Reallocation.* We are not persuaded that PTC's proposed experimentation will allow WLUZ-TV to gain an extreme and unfair competitive advantage over other Puerto Rico broadcasters or inhibit the development of UHF broadcasting there. Because PTC will incur substantial costs to build and operate the experimental facilities; conduct the program of experimentation; complete construction of the modification of its existing facility; and keep its existing facilities on "stand-by" status; it appears unlikely that PTC will be in a position to receive any windfall during the limited duration of the experimental authority. The petitioners' suggestions to the contrary are largely speculative, unsupported and unconvincing, and do not raise a substantial and material question. The petitioners' concerns regarding an adverse UHF impact are equally unpersuasive. In that regard, we note that the grant of this experimental authority will confer no additional coverage area beyond that which WLUZ-TV would in fact be entitled to serve, consistent with the Commission's Rules, within its predicted Grade B signal contour but for the extreme terrain features of Puerto Rico. Moreover, and in any event, a potential temporary shift adversely affecting what the petitioners claim as the "natural competitive structure" that has developed in present Puerto Rico broadcasting will be minimal due to the temporary nature of the experimental authority and the Commission's ability to cancel that authority at any time without notice or hearing should such facts come to our attention. See Section 74.112. Therefore, we believe that, on balance, the substantial benefits of sustaining the existing service to the public provided by PTC during the course of research designed to improve not only that service, but also other service impeded by severe terrain obstruction outweighs the temporary and, at this point, speculative detriment that may occur.

61. In this regard, so long as existing WLUZ-TV service is provided to Ponce, the community of license, we are unconvinced that the grant of this experimental authority will result in a *de facto* reallotment of Channel 7.[42] The fact that PTC seeks to analyze methods to overcome the severe terrain obstructions that prevent it from providing actual service to areas theoretically within its existing service contours does not require a finding that it seeks to abandon any service obligations to either its city of license or to those viewers to which it owes secondary service obligations. But for such terrain limitations, areas throughout the island, including San Juan and Mayaguez/Aguadilla, would enjoy not only WLUZ-TV programming, but also improved full island-wide television service. While the petitioners are correct in observing that the previous licensees of WLUZ-TV have tried many non-technical methods to increase signal coverage throughout Puerto Rico, it is apparent that such efforts evidence the difficulties of achieving greater service improvements in areas hampered by extreme topography consistently with Part 73 of the Rules for regular broadcast operation, and demonstrates the need for practical technical alternatives to be developed.

62. Finally, we are not persuaded that PTC's application should be denied merely because there are alternative means to increase WLUZ-TV coverage throughout Puerto Rico. PTC's proposed experiment provides a novel opportunity to amass and evaluate a wide range of information that will assist in a realistic reassessment of various approaches to overcome severe terrain obstructions. Those suggested alternatives do not contemplate any method for an individual broadcaster to undertake realistically to solve its own signal coverage problems in such areas without non-broadcast alternatives (*i. e.*, affiliation agreements) or less efficient use of valuable spectrum space (*i. e.*, translators). Thus, as proposed, PTC's experiment may yield a more practical, technical method to account for terrain limitations which, if viable, may be more realistically and effectively employed by similarly situated broadcast licensees.[43] In this regard, we are unable, at this time, to accept the petitioners' claims that any benefits to be realized by this experiment will be of little use to present Puerto Rico television stations. This proposal is not unlike the experimental operations we have authorized to explore the benefits and costs of synchronous AM broadcasting. While those operations have the potential to improve only a minority of existing AM stations, that has not been seen as a reason for denying them an opportunity to extend their service. However, even assuming that PTC's multiple-transmitter approach were presently unavailable to others, we observe that the site restrictions claimed by a number of the petitioners are based on coverage prediction models that are flawed and unreliable in instances of extreme topographic conditions. While it cannot be realistically expected that this research will yield any definitive model for every instance of terrain obstruction, the wide range of factors to be studied here should assist in the development of practical alternatives to overcome these problems. For the reasons stated above, we find that the grant of this application is consistent with both the purposes of our experimentation rules and the overall public interest of providing the most fair, efficient and equitable distribution of broadcast services possible. The petitioners' allegations fail to indicate that a contrary conclusion is warranted.

## CONCLUSION AND ORDERS

63. Having considered all the materials before us in this matter, we find that the petitioners and objectors have failed to raise a substantial and material question of fact that would warrant a hearing. We further conclude that PTC is fully qualified to operate as proposed in a manner consistent with this opinion. Further, we find that the grant of this application for experimental authority, as described herein, will serve the public interest, convenience and necessity.

64. Accordingly, IT IS ORDERED, That the petitions to deny and/or informal objections filed with respect to this application ARE DENIED.

65. IT IS FURTHER ORDERED, That the application of Ponce Television Corporation to construct an experimental broadcast facility on Channel 7, Ponce, Puerto Rico, IS GRANTED as described herein, in accordance with specifications to be issued, subject to the following conditions:

(a) Prior to the commencement of the operation authorized herein, PTC shall conduct field strength measurements in accordance with Section 73.686(c) of the Rules along a grid of points within Ponce, the city of license, and in accordance with Section 73.686(b) along several radials from each proposed experimental site sufficient to establish the extent and quality of reception provided by presently authorized facilities. This information will be used for

purposes of comparison with the coverage provided by the experimental facilities as measured at the same points.

(b) Upon completion of construction in accordance with this permit, PTC shall file with the Commission an application for a station license as required by Section 74.131 of the Commission's Rules. Because the use of the three separate transmitting facilities is critical to the proposed research, experimental operations will not be authorized until all such facilities are constructed and operational. PTC's authority to conduct experimental operations, as set forth herein, shall expire 24 months after issuance of a license.

(c) The existing WLUZ-TV facilities are to remain intact and in proper operating condition, as authorized, during the duration of this experiment.

(d) PTC shall be required to maintain precise frequency control equipment, as represented, at each of the three transmitter sites hereby authorized. The operation of these facilities may not cause any interference to any other communications facility.

(e) PTC shall make weekly announcements over its facilities informing viewers that it is operating pursuant to a grant of temporary experimental authority and that any comments to be submitted for the record in this matter should be sent to:

Chief, Television Branch
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554.

(f) Following the submission of the results of measurements taken regarding present WLUZ-TV coverage prior to the start of experimental operation, PTC shall submit a report to the Commission, every six months, including but not limited to the following information:

(i) Signal strength measurements (Peak Video Power values) measured at the established points, with pictured quality evaluations referenced to the TASO scale;

(ii) Information regarding areas (including size and population) of improved/diminished reception. Where reception is diminished, PTC shall indicate type and severity of picture degradation;

(iii) Areas of interference due to interaction of multiple transmitters (*i.e.*, contour overlap) and whether varying the configuration of transmitters operating simultaneously has any effect on such interference; and

(iv) Any other information regarding the aforementioned that will materially help the Commission evaluate the technical feasibility and effectiveness of the multiple-transmitter system. In that regard, PTC may wish to provide the Commission with video tapes illustrating the effects of its experimental operation, consistent with the above conditions.

66. The Commission reserves the right to terminate this authorization at any time without prior notice or right to hearing.

67. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

## FOOTNOTES

[1] On September 27, 1985, the Commission granted its consent to the voluntary transfer of control of PTC from Lucas Tomas Muniz to Malrite of New York, Inc., a subsidiary of Malrite Communications Group (Malrite). That transaction was consummated on May 14, 1986. Therefore, Malrite has succeeded in interest to, and has expressed its willingness to pursue, PTC's application for authority to construct the experimental facility. While the petitioners have raised certain allegations with respect to whether Malrite would in fact consummate that transaction, in light of that closing, those issues are moot and need not be discussed.

[2] As indicated in the engineering studies PTC has submitted, the composite Grade B contour of its proposed experimental operation covers 3,367 square miles and 3,155,396 persons, based on 1980 census figures.

[3] In this regard, BBI submits that it is unrealistic to treat this application as one for an experimental facility rather than one for a regular broadcast operation. Nevertheless, if treated as an experimental application, BBI urges that it be dismissed for failure to provide the specific information required of such applications, including the length of the proposed experiment, its expected termination date and requests for necessary waivers of Commission rules. If not dismissed, BBI argues that, once reviewed for acceptability and if accepted, the application should appear on a cut-off list so that other applicants may seek the permits sought by PTC.

[4] It is also alleged that PTC's proposal omits reference to the presence of a Channel 7 facility at Santa Domingo in the Dominican Republic which will also be subjected to predicted co-channel interference as a result of the proposed experimental operation. Petitioner SFN believes that while there is apparently no formal treaty between the Dominican Republic and the United States governing television allocations, our "good neighbor" policy would preclude short spacings to facilities in other friendly countries. Petitioner Telemundo similarly suggests that the impact of PTC's proposal on television service in the Dominican Republic may require consultation with the Department of State.

[5] Section 73.3518 of the Commission's Rules provides that "while an application is pending and undecided, no subsequent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee."

[6] Multi Media also states that it recently acquired the license of Station WSJN-TV, Channel 24, San Juan. It observes that its efforts to expand coverage to San Juan by acquiring a station there again demonstrates that adequate remedies are available

for Ponce licensees to enhance their economic viability apart from the "drastic proposal" advanced by PTC and available only to WLUZ-TV.

[7] Telemundo, for example, has submitted engineering studies purporting to show that 65 square miles and 22,531 persons currently within WLUZ-TV's predicted Grade B contour will not be included in the coverage area of any of the proposed transmitting facilities.

[8] SFN has submitted engineering studies which purport to demonstrate that as a result of the proposed experimental operation, existing WLUZ-TV service will be lost to: 62 square miles within the Grade B service area (representing 2 percent of the existing service area); 1,120 square miles within the Grade A service area (36 percent of the existing service area); and 1,540 square miles within the principal city grade service area (59 percent of the existing service area). When the effects of predicted co-channel interference due to the short-spaced transmitters are considered, SFN alleges that service will be lost to 1,800 square miles (53 percent) within the station's present Grade B service area; 2,005 square miles (64 percent) within the Grade A service area; and 1,938 square miles (74 percent) within the principal city grade signal contour.

[9] PTC states that the petitioners' allegation that the program of research and experimentation requires more than just the efforts of a single director of engineering is inaccurate. Although operation of the experimental program will be directed by Mr. Bracanovich, the station's proposed director of engineering, he will be working under the direct guidance and supervision of Robert L. Hammett, a recognized authority on the propagation of television signals, who has had specific experience predicting and measuring field strengths in Puerto Rico. Moreover, other engineers associated with Mr. Hammett, and local assistance, will be obtained where appropriate. PTC represents that these personnel are well-qualified to conduct the program of research as required by Section 74.131(a)(4) of the Commission's Rules.

[10] PTC states that questions are raised in the engineering exhibit submitted by SFN, concerning the South Site's directional antenna design, implying the necessity of a waiver of Section 73.658(e) of the Rules, which requires VHF transmitters employing a directional antenna to have a ratio of maximum-to-minimum radiation in the horizontal plane (null depth) not in excess of 10 dB. PTC contends that a 20 dB null depth in the pattern is desirable in this case to minimize potential interference to the other operating transmitters. In any event, PTC maintains that the exact null depth is not critical to the performance of the multiple transmitter system because, contrary to SFN's allegations, the main beam of the antenna is pointed away from the mountains making signal reflection from such points into protected areas unlikely. Moreover, it believes that a waiver of Section 73.685(e) to permit a null depth of more than 10 dB is not necessary because its proposed facility is experimental. We are in agreement with the applicant that the experimental nature of this proposal does not, *per se*, require waiver the provisions of Part 73 of the Commission's Rules for conventional broadcast operation and further discussion of that point is unwarranted. However, we do note that in any proposal contemplating regular broadcast facilities of this nature, a VHF applicant would be required to make a showing that the use of a directional antenna with a null depth in excess of 10 dB is justified and in the public interest.

[11] PTC points out that the offset frequency of 10,010 Hz chosen for the proposed system has been shown to provide the best co-channel interference protection for color television operation. See FCC/OST Report RS77-01, "A Review of the Technical Planning Factors for VHF Television Service," dated March 1, 1977. Further, it states that it is well documented that, depending on the number and level of interfering signals, an improvement of from four to six dB has been observed in interference protection when precise offset is used. Although it notes that some petitioners question the appropriateness of the six dB improvement figure used in the discussion of precise frequency offset, PTC asserts that it was used because only one of the other two transmitters will be of significance at a particular location from the standpoint of interference. However, it does recognize that the exact amount of improvement to be provided by precise offset operation cannot be predicted in advance. Therefore, it concludes, the experimental program is necessary to determine to what extent precise offset, in combination with directional antennas and terrain shadowing, will provide the desired interference protection and corresponding coverage improvement.

[12] It is stated that this vehicle will contain the necessary equipment to evaluate thoroughly the field strength and quality of the television signals to be studied. That equipment will include: VHF field strength meter; a rotatable antenna of known gain as well as general purpose receiving antennas; a spectrum analyzer covering Channel 7, with better than 3 kHz resolution and zero scan capability; television demodulator, waveform monitor and noise measuring set; a consumer-quality television receiver; and related equipment necesssary to analyze and document the data gathered.

[13] PTC states that the petitioners are incorrect in suggesting that the West Site transmitter is short spaced, and will cause objectionable interference, to a Channel 7 facility at Santa Domingo. It maintains that, as acknowledged by the petitioners, there is no formal agreement between the United States and the Dominican Republican regarding television allocations, rendering U.S. mileage spacing requirements irrelevant. In any event, PTC asserts that it has analyzed the potential for interference between the two transmitters and has concluded that the distance between the two affords complete protection. Finally, it notes that the Santa Domingo station, which now causes interference to WLUZ-TV reception on Puerto Rico's west coast, will actually cause less interference to the station as a result of the new West Site transmitter.

[14] PTC estimates that the number of persons receiving good quality service will increase from 320,987 to 1,420,349. This increase will come from those now receiving fair or poor service. Those estimated to receive fair quality service drop from 779,120 to 95,089; and those estimated to receive poor quality service drop from 501,656 to 86,325. Because of the imprecision of conventional coverage predictions due to terrain, PTC states that these estimates are not represented to be accurate indications of particular grades of service, as those will be determined during the experimental program.

[15] Further, with regard to Telemundo's assertion that the substantial amount of money to be devoted to this project evidences its non-experimental intent, PTC notes that in *WETA*, the Commission found that the licensee's allocation of only $100,000 for its program indicated that no true experiment was contemplated. 53 FCC 2d at 918. Thus, PTC reiterates that, contrary to the petitioners' suggestions, its willingness to devote substantial resources to the proposed experiment demonstrates its commitment and ability to conduct a *bona fide* program of research.

[16] PTC also points out the difficulties in obtaining the necessary amount of translator authorizations due to the many applications for available translator channels filed by low-power television applicants participating in the Commission's lottery process. PTC also contends that the use of translators would be

an inefficient use of the broadcast spectrum, precluding many other valuable uses for those frequencies that would otherwise be needed to approach the performance of the proposed system. It argues that by proposing multiple Channel 7 transmitters, WLUZ-TV will solve its own coverage problems using spectrum space that can be used by no one else without excluding any land areas from the assignment of new co-channel or adjacent-channel stations.

[17] PTC rejects the suggestion that WLUZ-TV reach affiliation agreements with San Juan and other Puerto Rico broadcasters in an effort to expand coverage. It states that one such agreement it attempted was rejected because "its proposed terms were prohibitive." In any event, PTC argues that such agreements are spectrum-wasteful and defeat the concept of diversity of viewpoints and media voices.

[18] *International Expo*, *supra* at 1378.

[19] As to the claim that one Puerto Rico licensee was unsuccessfully approached regarding an affiliation agreement, Telemundo alleges that there is no indication that the possibility of affiliating with other stations was explored or would even be favorably considered. Moreover, despite PTC's claim that the use of translators is impractical because of the many low power television applicants seeking such channels, it argues that PTC does not mention the possibility of either seeking to acquire these stations or reaching programming agreements with them as an alternative to its proposed experimentation.

[20] Similarly, Telemundo asserts that PTC's stated concerns regarding the alleged dangers of nighttime testing do not address the fact that WLUZ-TV's current weekend operations do not begin until shortly before noon, or explain why its present service could not be continued with limited interruptions when tests could not practically be performed at night or during weekend morning daylight hours. Additionally, Telemundo contends that the availability of daytime hours outside the station's regular broadcast schedule, with PTC's conceded intention to do some testing at night, further undercuts the claimed need to operate the proposed experimental facility commercially. As such, it maintains that PTC's "failure to address these points renders their description of the terrors of nighttime testing a colorful irrelevance."

[21] As to PTC's claim that the pendency of its application to modify its existing facilities demonstrates its ability to resume operations at its present site and indicates its "good faith," Telemundo suggests that Malrite's statement that it has no intention of competing in the Puerto Rico market as previous licensees of Channel 7 have makes clear that it does not intend to operate WLUZ-TV with its existing single-transmitter facilities. For similar reasons, Telemundo disagrees with PTC's position regarding whether these are inconsistent or conflicting applications.

[22] In response to PTC's claim that it is not abandoning its city of license, American Colonial Broadcasting Corp. has submitted the affidavit of its staff engineer who monitored WLUZ-TV's signal origination between January 5-12, 1986. He avers that during that time, the correlation of the number of signal originations from its San Juan facilities rather than from Ponce evidence a continuing pattern of non-compliance with the Commission's main studio location and program origination requirements of Sections 73.1125 and 73.1130 of the Rules.

[23] Telemundo states that PTC is flatly erroneous in claiming that "UHF impact was never applicable to an existing VHF station seeking better coverage of its *already authorized* service area." Such an issue, it notes, was in fact designated against PTC itself in 1972. *See Ponce Television Corp.*, 33 FCC2d at 940.

[24] Telemundo contends that PTC erroneously contrasts the money it will be required to invest to construct its proposed experimental facilities with the money WETA proposed to invest in conducting its experimental program. It notes that the 100,000 dollars referred to in the Commission's decision was unrelated to the investment WETA would have been required to make to construct the proposed facilities (a figure stated to be almost 225,000 dollars). Thus, Telemundo asserts that the tremendous cost PTC would incur to construct the proposed facilities reflects their intended permanent nature, while the minimal proposal advanced to measure the interference effects of its proposed operation reflects its lack of experimental value.

[25] In response to the claims raised by the petitioners in *International Expo* that Commission precedent required an examination of that proposal's *bona fide* experimental value, it was held that those cases were not controlling as the applicant did not intend to conform with those rules, but rather, requested a waiver of them. *Id.* at 1379, n. 2. Telecinco maintains that the Commission explicitly reaffirmed the integrity of the experimentation rules by granting such a waiver only upon the public interest benefits attending that applicant's unique, event-oriented, not-for-profit, short-term proposal; the information to be gathered regarding the need for such service; and whether such an operation is economically feasible.

[26] Telecinco points out that STC did not actually apply for authorization in the experimental services under Part 5 or Part 73 (specifically Section 73.1510) of the Commission's Rules. It notes that the Commission there stated that "there are subtle distinctions in the uses of the term 'experimental' and in . . . [STC's] case we are not bound by the usual perception of specified scientific experimentation." 91 FCC2d at 986. Thus, it argues, the Commission's approval of a flexible regulatory approach for the interim adoption of DBS procedures was particularly appropriate prior to formation of a permanent regulatory scheme for the entirely new service created by rulemaking. In the case at hand, however, Telecinco maintains that the Commission is bound by the strict limitations imposed by Part 74 of the Rules inasmuch as PTC's proposal is unrelated to the inauguration of a new, nationwide broadcast service. Further, because the Commission has not, by rule making or otherwise, sanctioned any plan for considering experimental applications to construct multiple-transmitter systems such as that here proposed, Telecinco believes that PTC's efforts to analogize the *STC* decision to its own application are misplaced.

[27] *Id.* Moreover, we note that Multi Media approvingly cited this language in support of its request, noted in footnote 6, *supra*, for waiver of Section 73.3555(a) of the Commission's Rules to permit its acquisition of WSJN-TV, Channel 24, San Juan, despite the fact that its predicted Grade B signal overlaps with that of commonly owned WKPV(TV) Ponce.

[28] Moreover, where actual signal levels were measured in the field to support particular drop-in proposals, Part 73 or equivalent procedures were not used or lacked supporting documentation. Under those circumstances, it was concluded that standard signal coverage and interference prediction methods would be more reliable for use in considering whether to assign the drop-in channels for Part 73 regular broadcast operation. 81 FCC 2d at 257.

[29] However, the Commission stated that applications for construction permits to build stations on the new allocations must include a request for waiver of the transmitter mileage separation rule, Section 73.610, and a showing of equivalent protection.

[30] *Docket No. 13924 (RM - 165 )*, *supra*.

[31] In fact, it was noted that if the UHF band were to become as extensively occupied in the future, similar considerations might apply, leading to the possibility that the use of UHF boosters might be prohibited.

[32] Moreover, insofar as PTC has filed an application to modify its existing facilities, pursuant to Part 73 of the Rules for conventional broadcast operations, we are unable to conclude that its application for experimental authority, pursuant to Part 74, is *per se* inconsistent. Because its proposed modification would be undertaken as an alternative to the experimental authority sought, in the event it is denied or cancelled, we find that that application is not inconsistent with Parts 73 or 74 of the Rules, and also serves the public interest in the event that WLUZ-TV is to operate from its present facilities.

[33] Such a possibility is explicitly recognized by PTC and Malrite which, as the transferee of the WLUZ-TV license, states that it is financially able and prepared to accept that risk. There is nothing raised or apparent in the petitioners' pleadings to indicate that Malrite is unable or cannot be relied upon to assume that risk or undertake the experimentation as proposed while keeping its present facilities in operational order. With respect to the petitioners' concern that this authorization is the first step leading to a permanent multiple-transmitter operation, those matters can be raised and fully addressed if and when such authority is sought.

[34] With respect to the spacing between PTC's proposed West Site transmitter and the Channel 7 facility in the Dominican Republic, we note that the petitioners' allegations concerning potential interference assumes operation with maximum facilities. However, because the West Site facility will be operated at substantially less than maximum power, we are unable to agree that such interference will be caused. Thus, even if a treaty existed between the two countries, no substantial and material question would be raised.

[35] Moreover, although the gains and losses are unquantifiable, the losses may be expected to be substantially less than found in *VETA, supra*, where the severe adjacent and co-channel interference that was expected to be caused to other television stations affected more than two million viewers.

[36] *STC*, 91 FCC2d at 986.

[37] See, *VHF TV Top 100 Markets*, 81 FCC2d at 235.

[38] To ensure that the public is fully aware of the experimental operation, we will require WLUZ-TV to broadcast periodic announcements regarding the nature of the experimental service and the participation of the viewing public. Thus, to the extent that the petitioners suggest that PTC will use improvements in coverage achieved by the experimental facilities to justify deviation from our rules for regular broadcast operations, we believe such concerns are unfounded.

[39] *WAIT Radio v. F. C. C.*, 418 F.2d at 1157.

[40] For similar reasons, we do not believe that PTC's proposal implicates Section 74.134 of the Rules, which proscribes common control of two or more experimental broadcast stations "unless a showing is made that the program of research requires a licensing of two or more separate stations." We view this proposal as an application for one experimental broadcast station, albeit operating with three distinct facilities. In any event, even if viewed as three separate stations, the program of research here, *i. e.*, to examine the efficacy of a multiple-transmitter approach to overcome severe terrain shielding, requires the licensing of each of the proposed facilities.

[41] Underlying that concern is the fact that if an applicant for conventional broadcast station fails to build, leading to the cancellation of its construction permit, both the Commission faced with the administrative burden of again accepting applications, processing them and placing them in a comparative hearing) and the public (deprived of television service until another application is granted) are adversely affected.

[42] The allegation that recent monitoring of WLUZ-TV's signal originations indicates non-compliance with the Commission's main studio location and program origination requirements, raised for the first time in ACBC's reply pleading, is untimely and does not present the applicant with an opportunity to file an appropriate response. See Section 1.45(c) of the Rules. In any event, PTC operates WLUZ-TV pursuant to a waiver of certain program origination requirements granted it pursuant to our 1969 decision noted previously. Thus, the mere correlation of the number of signal originations from any particular WLUZ-TV studio, without more, is insufficient to establish that such violations are occurring. However, to the extent that information were presented reflecting such practices, our decision today in no way prejudices whatever Commission action may be deemed appropriate. Further discussion at this time, however, is unwarranted.

[43] However, we wish to point out that our decision today does not affect our judgement, made in a comprehensive rulemaking proceeding, that the processing of a large volume of low power television applications precludes consideration of terrain shielding in that service. *See Low Power Television Report and Order*, 51 RR2d 476, 495 (1982), *recon. granted inpart*, 53 RR2d 1267, 1274 (1983).

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

**CC Docket No. 79-105**

In the Matter of

Detariffing the
Installation
and Maintenance of
Inside Wiring

## MEMORANDUM OPINION AND ORDER

**Adopted: November 13, 1986Released: November 21, 1986***

By the Commission: Commissioner Patrick concurring and issuing a statement.

### I. INTRODUCTION

1. During the past decade, we have addressed numerous issues relating to the installation and maintenance of inside wiring.[1] We most recently treated those areas in the *Second Report and Order* in Docket No. 79-105.[2] That document detariffed the installation of simple inside wiring and the maintenance of all inside wiring effective January 1, 1987;[3] gave preemptive effect to our decisions deregulating the installation and maintenance of inside wiring; and ordered telephone companies to relinquish all claims to ownership of "expensed" inside wiring by January 1, 1987, and of "capitalized" inside wiring by the end of the amortization period for the investment in that wiring.[4] Those actions were intended to complete the long-term process of deregulating inside wiring.

2. Twelve petitions for reconsideration of the *Second Report and Order*, nine comments on those petitions, and seven replies to those comments have been filed.[5] Collectively, those petitions challenge our preemption of state regulation of inside wiring installation and maintenance as well as our order that telephone companies relinquish all claims to ownership of inside wiring. Certain petitioners also request deferral of the January 1, 1987 deadline for detariffing the installation of simple inside wiring and the maintenance of all inside wiring, and for relinquishing ownership of expensed inside wiring. One of the petitions for reconsideration, that filed by Southwestern Bell, also requests a waiver under which that company could retain ownership of expensed inside wiring until complete amortization of Account 232. In addition, Pacific and BellSouth have filed separate petitions for waiver which request that the detariffing deadline be deferred until January 1, 1988, for their companies.[6]

3. Subsequent to the completion of the pleading cycle on the petitions for reconsideration, the Supreme Court held in *Louisiana Public Service Commission v. FCC* [7] that Section 2(b) of the Communications Act, as amended, 47 U.S.C. §152(b), bars this Commission from requiring states to use FCC-prescribed depreciation rates for intrastate ratemaking purposes. That holding invalidated our prior action requiring the states to follow the methods we had prescribed for inside wiring costs when they set intrastate rates.[8] Those methods provide for the expensing of inside wiring costs beginning October 1, 1981, and the amortization of all capitalized inside wiring costs over a period of no more than ten years.[9]

4. This *Memorandum Opinion and Order* reflects our reevaluation of our overall program for inside wiring in view of the subject petitions and *Louisiana Public Service Commission*. We have reexamined our objectives with regard to inside wiring, the means available to implement those objectives, and the impact of our actions on ratepayers and carriers. That reexamination leads us to affirm both the preemption of state regulation inconsistent with our inside wiring deregulatory actions and the choice of January 1, 1987, as the effective date for the detariffing actions taken in the *Second Report and Order*. We conclude, however, that means other than requiring telephone companies to relinquish claims to ownership of inside wiring will best achieve our objectives with regard to inside wiring. Accordingly, we eliminate the relinquishment requirement and substitute requirements that will protect consumers from possible abuses that might arise from the assertion of claims of ownership by telephone companies.

### II. BACKGROUND

5. The process of deregulating the installation and maintenance of inside wiring began in 1977 when this Commission determined that the cost-causative customers should bear the full costs of connecting station equipment to the telephone network.[10] Previously, those costs had been capitalized in Account 232, and allocated to present and future ratepayers rather than to the cost-causative customers.[11] We recognized that only deregulation of inside wiring installation and maintenance would achieve our objectives.[12] However, to limit the scope of the problem pending complete deregulation, we directed carriers to record all station connection costs incurred for inside wiring in Account 605, an expense account, instead of continuing to capitalize those costs in Account 232.[13] Inside wiring costs previously recorded in Account 232 were to be amortized over a period of no more than ten years.[14] We also preempted the states from using different accounting procedures in setting intrastate rates.[15]

6. While the change from capitalizing to expensing reallocated inside wiring costs from future to present ratepayers, such a change could never have ensured that each customer would separately and completely pay the costs it caused. Accordingly, we proposed, as the only reasonable means of effecting such payment, to detariff the installation and maintenance of inside wiring.[16] We also proposed that carriers be required to relinquish all claims to ownership of inside wiring once they had received an opportunity to recover all their inside wiring costs from ratepayers.[17] It was contemplated that the implementation of those proposals, in combination with the deregulation of CPE undertaken in the *Second Computer Inquiry*,[18] would result in unregulated and highly competitive markets for all telephone-related services on the customer side of the demarcation point separating customer premises from the telephone network.[19]

7. We acted first with regard to the installation of complex wiring, which was defined as "new intrasystem wiring installed with new CPE systems."[20] Since we had

detariffed the installation of new CPE systems in *Computer II*, it was inconsistent to have complex wiring installed under tariff. Therefore, to foster competition in the complex wiring installation market, we detariffed the installation of complex wiring in the same way and on the same basis as we had detariffed CPE in *Computer II*.[21] We, however, did not preclude telephone company claims of ownership of new complex wiring, because there was no justification for restricting carriers from leasing new complex wiring to their customers.[22]

8. The *Second Report and Order* extended detariffing to the installation of simple inside wiring and the maintenance of all inside wiring, effective January 1, 1987.[23] Those actions were intended to make the cost-causative customer bear the costs of connecting CPE to the telephone network, to foster competition in the inside wiring installation and maintenance markets, to promote new entry into those markets, to produce cost savings which would be passed on to ratepayers, and to foster the development of an unregulated, competitive telecommunications marketplace.[24] To avoid a fragmented approach in relation to those objectives, we gave preemptive effect to our decisions deregulating the installation and maintenance of inside wiring.[25] This Commission also determined that allowing telephone companies to retain ownership of inside wiring after fully recovering the costs of that wiring from ratepayers would not be desirable.[26] We ordered the companies to relinquish all claims to ownership of expensed inside wiring by January 1, 1987 and of capitalized inside wiring by the end of the amortization period for the costs of that wiring recorded in Account 232.[27] It was anticipated that telephone companies would fully recover the costs of capitalized inside wiring no later than September 30, 1994.[28]

## III. DETARIFFING OF INSIDE WIRING INSTALLATION AND MAINTENANCE

### A. Positions of the Parties

9. Although no petitioner seeks reconsideration of our decisions to detariff the installation of simple inside wiring and the maintenance of all inside wiring, NYDPS challenges the application of our detariffing actions to the states, and seven petitioners seek deferral of detariffing beyond the January 1, 1987 date set in the *Second Report and Order*.[29] NYDPS argues that Section 2(b)(1) of the Communications Act precludes preemption of state regulation of inside wiring installation and maintenance. Alternatively, NYDPS maintains that even if Section 2(b)(1) were to be interpreted as not covering inside wiring, preemption would be permissible only if an overriding federal policy could not be furthered without interfering with the states' regulatory authority over intrastate communications. According to NYDPS, we have not demonstrated that continued state tariffing of inside wiring would interfere at all with our goals. NYDPS claims that detariffing threatens universal service because labor costs for inside wiring installation and maintenance vary substantially among customers and because local telephone companies could refuse to maintain inside wiring. NYDPS suggests that this Commission should "exempt from the preemptive aspects of its order those states, such as New York, which have already implemented effective plans for customer ownership of inside wire and customer purchase of company-provided wire, and a meaningful competitive wire market plan."[30] In NYDPS' view, we should condition detariffing on relinquishment of ownership to prevent telephone companies from charging customers for inside wiring after the customers have paid for it. NYDPS maintains that states presumably would not be able to use the proceeds from such charges to reduce intrastate rates.

10. NYDPS, NYNEX, OPASTCO, and Independents request that we defer detariffing beyond January 1, 1987, citing the subsidies inside wiring installation and maintenance charges assertedly provide for other services. Those petitioners claim that detariffing consequently will require significant rate reallocations which this Commission should permit state regulators to phase in. NYDPS asks that we delay detariffing of at least the maintenance of inside wiring installed prior to January 1, 1987, until Account 232 is fully amortized to give state regulatory Commissions flexibility to implement detariffing based on local conditions. OPASTCO and Independents suggest a transition plan for small local telephone companies under which the interstate allocation for inside wiring would be frozen and gradually reduced over the amortization period for inside wiring costs recorded in Account 232. According to OPASTCO, such a plan would be similar to the CPE plan and could be applied on a case-by-case basis pursuant to waiver. Southwestern Bell, Cincinnati Bell, and Bell Atlantic ask that this Commission delay the effective date of detariffing until after the implementation of the cost allocation rules to be adopted in CC Docket No. 86-111.[31] Those companies maintain that telephone companies will be unable to decide intelligently on whether and how to participate in the detariffed inside wire market until after the completion of that proceeding and that they will, in any event, have to restructure their unregulated inside wiring services to meet the joint cost requirements once those requirements are adopted.

11. Two parties support the preemption of state tariffing of inside wiring installation and maintenance. Contel maintains that uniform federal detariffing policies are necessary to ensure achievement of this Commission's deregulatory goals and that telephone companies operating on a consolidated basis in more than one state require the regulatory certainty of national uniformity for efficient business planning. AT&T contends that our preemption action is entirely consistent with Section 2(b)(1), since inside wiring is used in part for interstate service and since this Commission has primary authority over jointly used terminal equipment. AT&T contends that the national policy objectives that prompted the detariffing of CPE exist especially with regard to inside wiring and, in effect, that those policy considerations justify preempting state tariffing of inside wiring installation and maintenance.[32]

12. Three parties oppose delay in detariffing.[33] AT&T claims that state regulators have had ample time to prepare for and mitigate the effects of detariffing; that the joint cost rules will be adopted before January 1, 1987 and could be used as an interim methodology until those rules become effective; and that existing methods could be used in any event to account for detariffed inside wiring services. Ameritech maintains that the parties seeking delay have cited no public benefit from delay. While Ameritech does not oppose a policy of granting interim waivers based on local problems, it believes that such problems do not warrant delaying national implementation. Contel states that it must show the Internal Revenue

Service it has been ordered to detariff before it can expense inside wiring costs for federal income tax purposes.

**B. Analysis**

1. Preemption of State Regulation

13. In the *Second Report and Order*, we determined that the "considerations which led us to preclude state as well as federal regulation of CPE require[d] that we give preemptive effect to our decisions to deregulate the installation and maintenance of inside wiring."[34] We remain convinced that preemption of state tariffing of the installation and maintenance of inside wiring is essential to achieve the goals of the Communications Act and is consistent with Section 2(b)(1).

14. By its terms, Section 2(b)(1) fences off from this Commission's jurisdiction certain matters in relation to intrastate communication services of any "carrier." That Section provides, in pertinent part:

> [N]othing in [the Communications] Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[35]

Because Section 3(h) of the Act,[36] equates "carrier" with "common carrier," Section 2(b)(1) applies only to common carriers and only in relation to those services which are properly classified as common carrier communication services. *See National Association of Regulatory Utility Commissioners v. FCC*, 525 F. 2d 630, 647 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976)(*NARUC I* ).

15. Although the Communications Act does not define common carrier or common carrier communication service, the Courts and this Commission have articulated the principles to be applied in determining whether a service is a common carrier communication service. Central among those principles is the principle that a telephone company does not become a common carrier with regard to each telecommunications-related service it may provide simply by undertaking to provide some services on a common carrier basis. *National Association of Regulatory Utility Commissioners v. FCC*, 533 F. 2d 601, 608 (D.C. Cir. 1976) (*NARUC II* ); *CCIA v. FCC*, *supra* at 210. On the contrary, if service providers are able "to custom tailor their offerings to the particularized needs of their individual customers," not even an undertaking to serve all members of the public indiscriminately will transform a service into common carriage. *Computer II*, *supra*, 77 FCC 2d at 431-32. *See also NARUC I*, *supra* at 644. Thus, if a communication service is not offered on a common carrier basis or a communications common carrier engages in an activity that is not classified as a communication service for purposes of Title II of the Communications Act, Section 2(b)(1) does not limit our power to preempt state regulation of that service or activity. This is evident both from the language of the statute and from prior court decisions sustaining our preemption of state regulation of non-common carrier communications offerings (*NARUC I*, *supra* ) and of carrier offerings that are not communication services (*CCIA v. FCC*, *supra* ). The Supreme Court's recent decision in *Louisiana Public Service Commission*, *supra*, does not alter or affect that established principle. This Commission assumed that we were preempting state regulation of depreciation and amortization practices relating to common carrier communication services when we adopted the decisions that were challenged in that case. The Supreme Court also assumed that this was the case when the Court concluded that our action violated Section 2(b)(1). The Court's decision does not hold or suggest that Section 2(b)(1) restricts our power to preempt state regulation of activities that are not common carrier communication services.

16. In our prior decisions concerning inside wiring, we have recognized that customers determine the location and service life of inside wiring,[37] and that the telephone company's responsibility for wiring ends at the demarcation point when the telephone company does not own the inside wiring.[38] We determined in the *Second Report and Order* that the installation and maintenance of inside wiring should no longer be classified as a communication service for Title II purposes, and none of the petitioners have disputed that determination. Like CPE services, inside wiring installation and maintenance are severable from underlying common carrier transmission services, and are susceptible to being provided by a wide variety of competing firms. Inside wiring installation and maintenance firms must provide individualized service to each of their customers, and, to the extent regulators permit, customer choices will force the service providers to make individualized decisions defining both the precise service provided to each customer and the terms on which it is provided. That ability to make "'individualized decisions in particular cases, whether and on what terms to deal,'" establishes that inside wiring installation and maintenance are not common carrier communication services. *CCIA v. FCC*, *supra* at 210. Accordingly, our preemption action does not constitute the exercise of "jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate *communication service. . . of any carrier*, "[39] and we must reject NYDPS' argument that Section 2(b)(1) precludes Commission preemption of state regulation of inside wiring installation and maintenance.

17. Although Section 2(b)(1) is not relevant, we do not, of course, suggest that we could or should preempt state regulation of *any* activity that is not a common carrier communication service. Our prior preemption decisions have generally been limited to activities that are closely related to the provision of services and which affect the provision of interstate services. We have preempted state regulation of such activities if, and only if, we have found that state regulation would be likely to produce results that conflict with the goals of the Communications Act.[40] Congress has directed that this Commission "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service at reasonable charges"[41] Preemptive detariffing of inside wiring installation and maintenance is an essential step in the process of discharging that mandate. Absent preemptive detariffing, the uneconomic and inefficient misallocation of inside wiring costs would persist,[42] and customers would be deprived unnecessarily of the full benefits of competition within the inside wiring installation and maintenance markets. In short, the interstate

telephone network will not function as efficiently as possible without the preemptive detariffing of inside wiring installation and maintenance.

18. Furthermore, as in the case of CPE, the provision of inside wiring cannot, as a permanent matter, be subject to separate federal and state requirements. The *Second Report and Order* observed that the same considerations that led us to conclude that CPE must be deregulated are applicable to the provision of inside wiring services. Those considerations are described in detail in paragraphs 140-161 of the *Computer II* decision.[43] The Court of Appeals agreed that those considerations required preemption of state CPE regulation. That Court observed:

> [P]reemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy. In *Computer II* the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here as in *NCUC I* and *II*, the state regulatory power must yield to the federal.[44]

Since inside wiring is also jointly used for interstate and intrastate services, it "is a practical and economic impossibility" for customers to have two inside wiring systems, one for interstate uses and another for intrastate uses.[45] Therefore, any state regulation of the provision of jointly used wiring would directly conflict with our requirement that charges for inside wiring installation and maintenance not be included in tariffed rates so as to ensure the competitive provision of inside wiring.[46] In *Louisiana Public Service Commission*, the Supreme Court explicitly recognized the established principle that Section 2(b)(1) does not give primacy to state regulation of inseverable practices. The Court found that this principle was not applicable to depreciation regulation because depreciation regulation is severable. The Court said that "it is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made,"[47] and that the depreciation case "is readily distinguishable from those in which FCC preemption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation."[48] We believe that a single uniform approach to the provision of inside wiring is necessary as it was in the case of CPE. A federal program of competitive, deregulated provision of inside wiring cannot coexist with a state system providing for regulated carrier provision of inside wiring, absent a requirement that consumers obtain two systems of inside wiring--one provided in accordance with the state requirements and another provided in accordance with the federal program.[49] The need for a single, unitary program for the provision of inside wiring provides an independent legal basis for our preemption in this proceeding.

**2. Timing of Detariffing**

19. In the *Second Report and Order*, we chose January 1, 1987 as the deadline for detariffing the installation of simple inside wiring and the maintenance of all inside wiring, because that deadline promised to give state regulators ample opportunity to prepare for detariffing and because any further delay in detariffing would prolong the period during which general ratepayers would pay inside wiring costs they did not cause.[50] The petitioners seeking deferral of detariffing have shown no grounds for altering those findings on a nationwide basis. This Commission proposed to detariff the installation and maintenance of inside wiring in April 1985.[51] We believe that over twenty months of advance notice is sufficient to let state regulators and telephone companies prepare for detariffing, particularly since we stated in May 1981 that detariffing would be the only reasonable means of ensuring that cost-causative customers bear inside wiring installation and maintenance costs.[52] Indeed, one of the principal grounds urged for deferral--that inside wiring charges are used to subsidize other rates--confirms that preemptive detariffing is necessary to achieve the objectives of the Communications Act. Detariffing should bring prices for these services into better alignment with costs except where, as discussed below,[53] deferral is appropriate to keep immediate rate reallocations from having a significant adverse impact on consumers.

20. Although we reaffirm our conclusion that all state regulation of the installation and maintenance of inside wiring must be preempted in order to achieve important statutory objectives, we recognize that the abrupt elimination of pricing and other distortions that have developed in a regulated environment can cause hardships that may be unduly disruptive. We are not persuaded that deregulation of inside wiring will produce immediate rate or other changes of sufficient magnitude to warrant a nationwide transition. The record does, however, demonstrate that some rate relationships in the State of New York have become so skewed that the immediate correction of the distortions would be likely to have a significant adverse impact upon consumers. An *ex parte* statement filed by NYNEX expands upon arguments made in NYDPS' and NYNEX' petitions for reconsideration regarding the effect of preemptive detariffing on New York consumers. That statement reveals that the New York Telephone Company (NYT) has been receiving annual inside wiring maintenance revenues of approximately $244 million although it estimates that it has inside wiring maintenance costs of approximately $33 million. These excessive earnings are reflected in lower rates for other intrastate services. A realignment of rates to correct those distortions would require a significant increase in some intrastate rates. Although NYDPS and NYT, like other states and telephone companies, had adequate notice of our detariffing actions and failed to make adjustments that other states and companies have made, the public interest would not be served by subjecting New York consumers to abrupt rate adjustments. Therefore, we will defer the effectiveness of our preemption decision for inside wiring maintenance services in the State of New York until January 1, 1990, to permit the NYDPS to devise and implement an orderly transition to rates that are more closely aligned with costs. The record does not indicate that consumers in any other state would be subject to an adjustment of the magnitude facing consumers in New York.

21. This limited deferral does not affect regulation of the installation of inside wiring and does not affect regulation of inside wiring maintenance in any jurisdiction other than the State of New York. This deferral also does not alter federal regulation of inside wiring maintenance within New York. Exchange carriers that operate in that state will account for future inside wiring maintenance costs in accordance with our accounting rules and will exclude all such costs from interstate revenue requirement and interstate pooling distribution computations.

22. The pendency of joint and common cost allocation questions in CC Docket No. 86-111 does not warrant deferral of detariffing. We are not persuaded that the pendency of those questions will affect any telephone company's decision as to its offering of inside wiring installation and maintenance services. Moreover, we believe that there would be sufficient alternative providers of those services even if some companies were to withdraw from those markets prior to the promulgation of final rules in the joint cost proceeding. Telephone companies will be able to allocate joint and common costs to detariffed inside wiring installation and maintenance operations on a fully distributed cost basis pending the effective date of those rules.[54] We recognize that carriers may have to restructure their inside wiring operations and accounting methods one additional time as a result of that proceeding. However, we believe that the benefits of detariffing on January 1, 1987, far outweigh the costs of restructuring; and we will proceed with detariffing on that date. The one-year waiver requests of Pacific and Bell-South also fail to justify a deferral of our decision. Those waiver requests are discussed in Part V of this opinion.

## IV. RELINQUISHMENT OF CLAIMS TO OWNERSHIP OF INSIDE WIRING

### A. Summary of Arguments

23. The requirements that telephone companies relinquish all claims to ownership of expensed inside wiring by January 1, 1987, and of capitalized inside wiring by the end of the amortization period for the costs of that wiring recorded in Account 232, generated considerable controversy. Although only NYNEX and USTA oppose mandatory relinquishment, eight other parties either challenge the rationale for mandatory relinquishment set forth in the *Second Report and rder* or request that we change that rationale to eliminate any precedential value the relinquishment mandate might have.[55] In addition, ten parties request deferral of the ownership relinquishment dates set in the *Second Report and Order*.[56] NATA and GTE favor mandatory relinquishment, but even they suggest refinements in the rationale for that action.

24. The oppositions to mandatory relinquishment are based on the proposition that this Commission lacks authority to order telephone companies to relinquish ownership of their assets. NYNEX, USTA, and others contend that mandatory relinquishment amounts to a taking of carrier property without just compensation by an agency which lacks both eminent domain power and the power to determine the amount of compensation to be paid. Those parties state that in *Florida Power Corp. v. FCC*,[57] the Court of Appeals declared unconstitutional the Pole Attachment Act,[58] on the ground that the Commission, as a federal administrative agency, does not have the power to determine just compensation for Fifth Amendment purposes.[59] Several parties also maintain that any order mandating relinquishment of telephone company assets once they have been fully expensed or amortized has serious long-term ramifications for investment in the telephone industry. USTA, for example, contends in that regard that potential investors would be reluctant to invest in the telephone industry if carriers are going to cease to own valuable assets once their accounting lives (but not their useful lives) have expired. Other parties urge that this Commission can avoid those ramifications by eliminating the precedential value of its relinquishment mandate. This would be done, in Ameritech's view, if we were to rely solely on the unique characteristics of inside wiring to support mandatory relinquishment. Those characteristics are that inside wiring is affixed to specific customer premises, is not fully controlled by the telephone company, and is not always susceptible to specific identification or quantification by the telephone company.

25. NYNEX and USTA suggest that this Commission can achieve its objectives without mandating relinquishment. According to NYNEX, the Commission could ensure that telephone companies do not reap additional benefits from costs which have been fully recovered by directing that the proceeds from any sale of inside wiring be accounted for "above the line" as a credit to the depreciation account reserve. In contrast, USTA states that we could require that local exchange carriers' ownership interests in inside wiring be transferred to non-regulated affiliates, sold to private entities, or taken "below the line" and removed from the jurisdictional separations process.

26. Eight of the ten parties favoring deferral of the relinquishment dates set in the *Second Report and Order* ask that the date for relinquishing expensed inside wiring be delayed until full amortization of inside wiring cost recorded in Account 232.[60] Those requests are based on the problems telephone companies would encounter in attempting to determine precisely which inside wiring has been expensed and which has been capitalized. The problems would arise from the way many telephone companies keep their inside wiring records. While the precise steps required to identify which inside wiring has been expensed vary from company to company, it appears that many identification processes would require massive, and costly,[61] searches of telephone company records and might not be completely successful. Petitioners argue that such searches are not warranted, particularly since many customer premises contain both expensed and capitalized inside wiring. According to Southwestern Bell, the requested deferral of the relinquishment date for expensed inside wiring would not adversely affect the future owners of that wiring, because "the building owner/customer [would] be permitted to rearrange, change, remove, repair or add to the wiring at his discretion" during the deferral period.[62]

27. Five parties ask that the relinquishment deadline be delayed for a sufficient time to avoid recapture of all investment tax credits (ITCs) associated with inside wiring which have been expensed for regulatory purposes, but capitalized for tax purposes.[63] Those requests arise because some telephone companies have been capitalizing for federal income tax purposes inside wiring costs which have been expensed for accounting and ratemaking purposes. Those telephone companies assertedly would lose ITCs associated with that wiring if they dispose of it

within five years of having incurred the relevant costs. The petitioners contend that deferring relinquishment of inside wiring until the investment in it has ceased to be of economic benefit to the telephone company is implicit in our treatment of capitalized inside wiring and that we, therefore, should not require relinquishment of expensed inside wiring until expiration of the five-year holding period to avoid recapture of ITCs associated with that wiring.

28. NATA's and GTE's support for mandatory relinquishment is based on their belief that it is not necessary for this Commission to reach any eminent domain questions to sustain that action. Those parties assert that under the principles established in *Democratic Central Committee*,[64] there can be no "taking" of telephone company property when, as NATA asserts is the case with regard to inside wiring, ratepayers rather than investors have borne the risk of loss associated with telephone company property. NATA and GTE assert that since telephone companies will not have to relinquish ownership of any inside wiring until after it has been fully amortized or expensed, the companies will have been fully compensated for their investment in that wiring. In GTE's view, mandatory relinquishment should be considered to be a regulation, not a taking, of telephone company property absent a showing that the fully compensated investor bore the risk of loss associated with inside wiring.

29. NATA also contends that the telephone companies' inability to distinguish expensed inside wiring from capitalized inside wiring raises questions regarding customer access to and use of inside wiring. Therefore, NATA proposes, this Commission should condition any delay in the relinquishment schedule on the telephone companies' agreeing to provide full and free use of inside wiring pending relinquishment, as suggested by Southwestern Bell. NYDPS shares similar concerns and argues that detariffing should be conditioned on relinquishment to keep telephone companies from charging customers for the use or other disposition of inside wiring during any period between detariffing and relinquishment.[65] Ameritech contends, however, that NATA's proposal attempts to reopen matters resolved in the *ICA Order*,[66] and that we must provide notice and public comment before addressing those matters.

**B. Analysis**

30. In the *Second Report and Order*, we determined that we had the power to order telephone companies to relinquish all claims to ownership of inside wiring, provided the companies would have an opportunity to receive full compensation for the costs of that wiring prior to relinquishment.[67] We established relinquishment deadlines which promised to afford such compensation without imposing any additional costs on telephone companies or ratepayers, while fulfilling our underlying objectives.[68] In reevaluating our overall inside wiring program in light of the petitions for reconsideration and *Louisiana Public Service Commission*, we conclude that our relinquishment requirements impose unnecessary costs and that means other than mandatory relinquishment will best achieve our objectives with respect to inside wiring.

31. The inside wiring program established in the *Second Report and Order* requires the relinquishment of expensed inside wiring by January 1, 1987, and of capitalized inside wiring by the end of the amortization period for the costs of that wiring. The parties seeking deferral of the deadline for relinquishing ownership of expensed inside wiring until the deadline for relinquishing capitalized inside wiring have established that telephone companies would incur substantial costs in attempting to identify which inside wiring has been expensed. This is one factor which we have considered in our decision to modify our relinquishment requirement.

32. The relinquishment deadlines set in the *Second Report and Order* were based on the accounting methods we had established for inside wiring costs.[69] Because we follow those methods in setting interstate rates and we had preempted the states from using other inside wiring accounting methods in setting intrastate rates,[70] we assumed that all inside wiring costs will have been expensed or amortized for ratemaking purposes by the point when the balances in Account 232 have been fully amortized.[71] Having made that assumption, we were able to conclude that the telephone companies would receive full compensation for their inside wiring costs prior to relinquishment and that our relinquishment mandate, therefore, would not deprive telephone companies of any property without just compensation.[72]

33. Our assumption that all inside wiring costs will have been expensed or amortized for intrastate ratemaking purposes by the time the balances in Account 232 have been fully amortized may no longer be valid. In *Louisiana Public Service Commission*, the Supreme Court held that the states need not use for intrastate ratemaking purposes the methods we have prescribed for inside wiring.[73] As a consequence of that decision, state regulatory agencies may set intrastate rates using amortization schedules for capitalized inside wiring that would defer recovery of the intrastate portion of the costs of that wiring until after our relinquishment deadline for that wiring. If that were to happen, we would be requiring telephone companies to relinquish their claims to ownership of capitalized inside wiring before they received an opportunity to recover all the costs of that wiring from their customers.

34. We can accomplish our original purposes by other means that do not raise these problems. The assertion of a claim of ownership would not inevitably conflict with the objectives of our decision to deregulate the installation and maintenance of inside wiring, but a claim of ownership could be used under certain circumstances to justify conduct that conflicts with those objectives. Our objectives can accordingly be satisfied by precluding such conduct in lieu of requiring telephone companies to relinquish claims of ownership.

35. Customers' ability to obtain inside wiring installation and maintenance from sources of their own choosing could be inhibited if a telephone company were to use a claim of ownership as basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. Therefore, we will preclude telephone companies from imposing such restrictions with respect to inside wiring that has ever been installed or maintained under tariff. Ratepayer rights would also be abridged if telephone companies were to receive additional compensation for such wiring after it has been expensed or fully amortized. Therefore, we will preclude the telephone companies from requiring that such wiring be purchased and from imposing a charge for the use of such wiring.[74] Telephone companies may, of course, collect wiring maintenance fees on an untariffed basis from anyone who chooses to use that service, provided the companies use

the accounts provided for unregulated activities. In addition, telephone companies shall account for any sale of unamortized inside wiring on the books of the regulated company and in accordance with prescribed retirement accounting requirements.

## V. PETITIONS FOR WAIVER

### A. Positions of the Parties

36. As indicated above,[75] Pacific and BellSouth have requested one-year waivers of the January 1, 1987 deadline for detariffing the installation of simple inside wiring and the maintenance of all inside wiring. Pacific bases its waiver request on the "extreme customer confusion and shock" Pacific's customers assertedly would experience if they were required to "self manage" inside wiring without the benefit of an extensive year-long inside wiring education program;[76] and Pacific has submitted a "Market Study," which allegedly demonstrates the extent of such confusion. In addition, Pacific relies on a "Wire Market Analysis," which allegedly discloses a scarcity of inside wiring maintenance companies in California. Pacific says that, unlike many telephone companies, it has not had a separate, unbundled tariff plan for the maintenance of simple inside wiring. Therefore, Pacific argues, its customers have had little experience in dealing on their own or with companies other than Pacific for rearrangements or extensions of inside wiring, and are grossly unprepared to assume responsibility for self management of inside wiring. In Pacific's view, a year-long education program will be necessary to prepare its customers for detariffing. During that year, Pacific intends to continue and expand its program of equipping its customer locations with modular network interface devices to facilitate the development of an inside wiring marketplace.[77] Pacific considers its participation in the detariffed inside wiring maintenance market to be crucial to customer service. Nevertheless Pacific states that it will be unable to make an informed business decision on whether to enter that market until after the adoption of joint and common cost allocation rules in Docket 86-111.

37. BellSouth bases its waiver request on the pendency of the joint and common cost allocation rulemaking, and on a belief that deferring detariffing until January 1, 1988 would lessen confusion among its customers. It says that its companies operate in many rural areas, which are not readily accessible to independent inside wiring vendors. BellSouth argues that the proposed waiver would give independent firms time to enter the inside wiring maintenance market and would let the BellSouth companies educate their customers as to the effects of detariffing.

38. Six and four parties have commented on Pacific's and BellSouth's respective petitions. AT&T contends that the petitions fail to justify the requested waivers and, in effect, that competitive markets for the provision of inside wiring services should be permitted to develop free from artificial regulatory constraints. AT&T asserts that BellSouth's petition alleges no particular facts or circumstances peculiar to that company and that Pacific's attempt to show that it faces unique circumstances in California is deficient. In particular, AT&T claims that by focusing solely on telephone equipment and systems suppliers, Pacific's "Wire Market Analysis" ignores a large pool of inside wiring service providers, namely electrical service contractors and cable television providers. CWA suggests that granting Pacific's waiver request would help that company use its technician workforce efficiently, to the benefit of CWA members and the public. Cincinnati Bell contends that BellSouth has made clear that January 1, 1988, is the earliest possible deadline for detariffing the installation and maintenance of inside wiring that will avoid exacerbating inevitable customer confusion. Cincinnati Bell observes that embedded CPE will be detariffed on January 1, 1988, and that customers frequently view inside wiring as an integral part of CPE. Bell Atlantic supports both petitions, provided that detariffing is deferred for all affected telephone companies. NYNEX also urges that we defer detariffing for all telephone companies. However, NYNEX contends that we should grant Pacific's waiver request and consider expeditiously and favorably similar waiver requests filed by other companies in the event we do not defer detariffing for all telephone companies. In contrast, Mountain States opposes any industry-wide delay in detariffing and suggests that any waivers of the detariffing deadline for individual companies be conditioned on the removal of those companies' inside wiring costs from the mandatory National Exchange Carrier Association (NECA) pool.

### B. Analysis

39. As a general matter, a party seeking waiver of a requirement of this Commission must demonstrate that the application of the requirement to its particular situation would not serve the public interest and that the proposed waiver would not undermine the public policies the requirement serves. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Neither Pacific nor BellSouth has met that test. To a large extent, their petitions merely dispute factual conclusions and policy choices this Commission made in ordering detariffing. Neither company, however, petitioned for reconsideration of the *Second Report and Order*. Moreover, the petitions for waiver fail to show that the requested waivers would serve the public interest. We find no support for the inherently unlikely propositions that detariffing will produce "extreme customer confusion and shock" or that lengthy education programs will be necessary to enable telephone customers to adapt to detariffing.[78] Accordingly, we are not persuaded that Pacific and BellSouth will be unable to prepare their customers for detariffing by January 1, 1987. Further, neither company has shown that there will be a shortage of inside wiring service providers in their service areas after that date or that other circumstances peculiar to their service areas would justify a waiver. Therefore, we will deny Pacific's and BellSouth's waiver requests.[79]

## VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, that the petitions for reconsideration of the *Second Report and Order* in Docket 79-105 ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

41. IT IS FURTHER ORDERED, that the petition for waiver filed April 14, 1986, by Southwestern Bell IS DISMISSED.

42. IT IS FURTHER ORDERED, that the petitions for waiver filed July 25, 1986, and August 25, 1986, by Pacific Bell and BellSouth, respectively, ARE DENIED.

43. IT IS FURTHER ORDERED, that the telephone companies shall comply with the prohibitions described in paragraph 35 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Commission Record.

## FOOTNOTES

[1] In a physical sense, inside wiring refers to "the customer premises" portion of the telephone plant which connects station components to each other and to the telephone network. *Report and Order*, Docket No. 82-681, Modifications to the Uniform System of Accounts for Class A and B Telephone Companies, 48 Fed. Reg. 50534, slip op. at 3 (Nov. 2, 1983) (hereinafter *Complex Wiring Order* ). In combination with customer premises equipment (CPE), it constitutes all telephone plant located on the customer's side of the demarcation point marking the end of the telephone network. *See* 47 C.F.R. §68.3(p). For accounting purposes, inside wiring includes both the costs of the wiring described above and the labor and other costs associated with installing that wiring on the customer's side of the demarcation point.

[2] Detariffing the Installation and Maintenance of Inside Wiring, 51 Fed. Reg. 8498 (Mar. 12, 1986) (hereinafter *Second Report and Order* ).

[3] Generally, any inside wiring which connects station components to each other or to common equipment of a private branch exchange (PBX) or key system is classified as complex wiring (also called intrasystem wiring). Simple inside wiring is any inside wiring other than complex wiring. *See Second Report and Order*, *supra* at 1 n.2.

[4] Expensed inside wiring refers to inside wiring whose costs are presently recorded in Account 605 (Installation and repairs of station equipment). Capitalized (or "embedded") inside wiring refers to inside wiring whose costs are presently recorded in Account 232 (Station connections-inside wiring).

[5] Appendix A lists the subject petitions, comments, and replies as well as the abbreviations this *Memorandum Opinion and Order* uses to identify the parties to this proceeding.

[6] Appendix A also lists the comments and replies filed in connection with Pacific's and BellSouth's petitions. There has been no separate pleading cycle on Southwestern Bell's petition for waiver, since that petition was in the same document as Southwestern Bell's petition for reconsideration.

[7] 106 S.Ct. 1890 (1986).

[8] *Id.* at 4-6, 22-23, *rev' g Memorandum Opinion and Order*, Docket No. 79-105, Amendment of Part 31, Uniform System of Accounts for Class A and B Telephone Companies, 92 FCC 2d 864 (1983)(hereinafter *Preemption Order* ).

[9] *First Report and Order*, Docket No. 79-105, Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 85 FCC 2d 818, 828-29 (1981)(hereinafter *Expensing Order* ). A four-year transition period was established to permit the phasing-in of the change from capitalizing to expensing. *Id.* at 829. Since the transition period ended on September 30, 1984, capitalized inside wiring costs recorded in Account 232 will be fully amortized for accounting purposes no later than September 30, 1994.

[10] *See Expensing Order*, *supra* at 819-20; *Notice of Proposed Rulemaking*, Docket No. 79-105, Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 44 Fed. Reg. 48988, slip op. at 3 (1979)(hereinafter *1979 Notice* ); *American Telephone and Telegraph Co.*, 64 FCC 2d 1, 89-90 (1977), *recons. in part*, 67 FCC 2d 1429 (1978). The station connections costs included, in addition to the cost of the wire itself, substantial labor charges for the time telephone company personnel spent taking orders for new or changed service, making work assignments, driving to and from customer premises, and performing installation and maintenance work at the premises. *See 1979 Notice*, *supra* at 1.

[11] *Expensing Order*, *supra* at 819-20.

[12] *Id.* at 827.

[13] *Id.* at 827-28.

[14] *Id.* at 828-29. We also permitted telephone companies to phase-in the change from capitalizing to expensing over a four-year period. *See* note 9, *supra*.

[15] *Preemption Order*, *supra* at 879-80, *rev' d sub nom. Louisiana Public Service Commission v. FCC*, *supra*.

[16] *Further Notice of Proposed Rulemaking*, Docket No. 79-105, 50 Fed. Reg. 13991 (Apr. 9, 1985). *See also Further Notice of Inquiry*, Docket No. 79-105, 86 FCC 2d 885, 885-86 (1981).

[17] *Further Notice of Proposed Rulemaking*, *supra* at 7.

[18] *Final Decision*, 77 FCC 2d 384 (hereinafter *Computer II* ), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff' d sub nom. Computer and Communications Industry Ass' n v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982) (hereinafter *CCIA v. FCC* ), *cert. denied sub nom. Louisiana Public Service Commission v. United States*, 461 U.S. 938 (1983), *aff' d on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[19] *See Further Notice*, *supra* at 1-2.

[20] *Complex Wiring Order*, *supra* at 17.

[21] *Id.* at 4, 16-18.

[22] *Id.* at 17.

[23] *Second Report and Order*, supra at 20.

[24] Id. at 15-20. See also Further Notice of Proposed Rulemaking, supra at 1-2.

[25] Second Report and Order, supra at 20, citing Computer II, supra, 77 FCC 2d at 455-57.

[26] See Second Report and Order, supra at 23-24; Further Notice of Proposed Rulemaking, supra at 7.

[27] Second Report and Order, supra at 26.

[28] See id. at 21.

[29] Those parties are Bell Atlantic, Cincinnati Bell, Independents, NYDPS, NYNEX, OPASTCO, and Southwestern Bell.

[30] NYDPS Petition at 8-9.

[31] Notice of Proposed Rulemaking, Docket No. 86-111, Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 104 FCC 2d 59 (1986)(hereinafter Joint and Common Cost Notice). The rules that this Commission will adopt in that proceeding will not become effective in time to be reflected in January 1987 tariffs.

[32] Independents and USTA also support detariffing, but they do not make clear whether that support encompasses the Commission's preemption action.

[33] Those parties are Ameritech, AT&T, and Contel.

[34] Second Report and Order, supra at 20 (footnote omitted).

[35] 47 U.S.C. §152(b)(1).

[36] 47 U.S.C. §153(h).

[37] First Report and Ordre, supra at 827.

[38] Technical Standards Order, supra at 529-30, 536-37.

[39] 47 U.S.C. §152(b)(1)(emphasis added).

[40] For example, we did not preempt all state regulation of carrier provision of billing and collection service for other carriers when we concluded that this activity is not a communication service and should be detariffed at the federal level. Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986), recon. denied, Memorandum Opinion and Order, CC Docket No. 85-88 (released Nov. 6, 1986).

[41] 47 U.S.C. §151.

[42] This misallocation takes two forms. When tariffed rates are less than the true economic costs of installation and maintenance activities, general ratepayers subsidize cost-causative customers, and potential entrants into the inside wiring installation and maintenance markets face higher entry barriers than they would face in competitive markets. When tariffed rates exceed the true economic costs of those activities, cost-causative customers subsidize general ratepayers, and the telephone company lacks the incentives to cut costs it would have in a competitive market. A competitive, unregulated market is more likely than a competitive market that is subject to regulatory interference to produce efficient prices.

[43] 77 FCC 2d at 438-47. Among the considerations which persuaded us to hold that CPE need not be regulated under Title II of the Act was the existence of a large number of non-carrier providers of CPE, which established that CPE provision is not integral to the offering of common carrier transmission services. We found that the telephone companies' practice of offering CPE under tariff, bundled with basic transmission services, could distort the rates paid for those services. In the exercise of our powers under Sections 1 and 2(a) of the Act, 47 U.S.C. §§151, 152(a), we detariffed CPE in order to replace intrusive regulation with the discipline of a competitive marketplace. Comput er II, supra, 77 FCC 2d at 438-47. This approach has saved consumers substantial amounts in equipment costs since it is less expensive to purchase CPE than it was to rent it from the telephone company.

[44] CCIAv.FCC, supr a at 216.

[45] NCUCI, supra at 1043.

[46] As with CPE, the inclusion of charges for inside wiring services in the rates for transmission services "will certainly influence the consumer's choice" of service provider by reducing the direct charges for inside wiring imposed by the telephone company. CCIA v. FCC, supra at 215. See n.43, supra.

[47] 106 S. Ct. at 1902.

[48] Id. at n.4 (emphasis in original).

[49] The fact that we are deferring our preemption of the detariffing of inside wiring maintenance in New York State, see para. 20, infra, does not undermine this conclusion. In the long run, two disparate approaches to the provision of inside wiring cannot coexist. Insofar as New York is concerned, we are exercising our discretion to institute temporary deferral of the steps necessary to achievement of our federal objectives in order to avoid possible adverse consequences for consumers in New York. This in no way suggests that our determination regarding the manner in which inside wiring used for interstate services should be provided can be fully implemented without preemption of inconsistent state programs. It simply means that we have chosen to delay achievement of our federal objectives in deference to other overriding concerns in the unique circumstances present in the case of New York.

[50] Second Report and Order, supra at 19-20.

[51] Further Notice of Proposed Rulemaking, supra at 1, 3-5.

[52] See Further Notice of Inquiry, supra at 886.

[53] See para. 20, infra.

[54] Joint and Common Cost Notice, supra, slip op. at 46 n.96. Like other inside wiring costs, the portion of joint and common costs allocated to inside wiring services will be recorded in Account 106 (Nonregulated investments) once those services are detariffed. See Second Report and Order, supra at 25. Account 106 is used in conjunction with Account 317 (Income from nonregulated activities). The use of those accounts is guided by the fully distributed cost rules adopted in Fifth Report and Order, Docket No. 81-893, Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, 49 Fed. Reg. 46378 (Nov. 26, 1984).

[55] Those parties are Ameritech, AT&T, Bell Atlantic, Contel, Independents, Mountain Bell, OPASTCO, and Southwestern Bell.

[56] Those parties are Ameritech, BellSouth, Centel, Cincinnati Bell, Contel, Independents, NYNEX, OPASTCO, Southwestern Bell, and United.

[57] 772 F. 2d 1537 (11th Cir. 1985) (per curiam), prob. juris. noted, 54 U.S.L.W. 3787 (U.S. June 3, 1986) (No. 85-1658).

[58] 47 U.S.C. §224.

[59] Florida Power Corp. v. FCC, supra at 1544.

[60] Those parties are Ameritech, BellSouth, Cincinnati Bell, Contel, Independents, NYNEX, OPASTCO, and Southwestern Bell.

[61] NYNEX estimates that NYT would spend at least $39,300,000 attempting to make the identification.

[62] Southwestern Bell Petition at 6.

[63] Those parties are Centel, Contel, Independents, OPASTCO, and United.

[64] Democratic Central Committee v. Washington Metro Area Transit Comm'n, 485 F. 2d 786 (D.C. Cir. 1973), cert. denied sub nom. D.C. Transit System v. Democratic Central Committee, 415 U.S. 935 (1974).

[65] Such charges would be in addition to the amortization of capitalized inside wiring costs in regulated rates.

[66] Petition for Declaratory Ruling regarding the Rights of Users, 101 FCC 2d 287 (1985), recon. denied, FCC 86-9[illegible] (released Feb. 28, 1986).

[67] Second Report and Order, supra at 20-24.

[68] Id. at 23-24.

[69] See para. 5, supr a, for a discussion of those accounting methods.

[70] See Preemption Order, supra at 879-80, rev'd sub nom. Louisiana Public Service Commission v. FCC, supra.

[71] See Second Report and Order, supra at 23.

[72] Ib id.

[73] The Court's decision does not contradict our determination that the installation and maintenance of inside wiring are not common carrier communications offerings. In this context, we interpret Louisiana Public Service Commission to prevent us from prescribing depreciation related to inside wiring as long as it is regulated under tariff.

[74] This requirement does not affect the recovery of costs associated with capitalized inside wiring which was installed or maintained under tariff and whose costs have not been fully amortized.

[75] See para. 2, supra.

[76] Pacific Petition at 5-6.

[77] Less than one percent of Pacific's customer locations are presently equipped with such devices.

[78] Indeed, Pacific's "Market Study" indicates that the study participants "easily understood" our detariffing order. Pacific Petition at Ex. A, p. 3. We believe that consumers who have been able to self manage electrical wiring, plumbing, gas pipes, and the like, see id. at 7, will be able to self manage inside wiring without much difficulty.

[79] In view of our elimination of the relinquishment requirement, we will dismiss as moot Southwestern Bell's request for waiver of the January 1, 1987 relinquishment deadline for expensed inside wiring.

## APPENDIX A

### PARTIES: RECONSIDERATION OF *SECOND REPORT AND ORDER*, CC DOCKET 79-105

Filing Petitions for Reconsideration:

1. Ameritech Operating Companies (Ameritech);
2. Bell Atlantic;
3. Central Telephone Company (Centel);
4. Cincinnati Bell Telephone Company (Cincinnati Bell);
5. Continental Telecom, Inc. (Contel);
6. Elkhart Telephone Company, Fidelity Telephone Company, Merrimack County Telephone Company, Waitsfield-Fayston Telephone Company, and San Marcos Telephone Company (the Independents);
7. New York State Department of Public Service (NYDPS);
8. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX);
9. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO);
10. Southwestern Bell Telephone Company (Southwestern Bell) (Petition for Partial Reconsideration or, in the Alternative, Petition for Waiver);
11. United States Telephone Association (USTA); and
12. United Telephone System, Inc. (United).

Filing Comments on the Petitions for Reconsideration:

1. American Telephone and Telegraph Company (AT&T);
2. Ameritech;
3. BellSouth Corporation (BellSouth);
4. Contel;
5. GTE Service Corporation and its affiliated domestic telephone operating companies (GTE);
6. Independents;
7. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (Mountain States);
8. National Telephone Cooperative Association (NTCA); and
9. North American Telecommunications Association (NATA).

Filing Reply Comments:

1. Ameritech;
2. Bell Atlantic;
3. BellSouth;
4. Independents;
5. NYNEX;
6. OPASTCO; and
7. Southwestern Bell.

### PARTIES: PACIFIC BELL PETITION FOR WAIVER

Filing Comments:

1. AT&T;
2. Bell Atlantic;
3. BellSouth;
4. Communications Workers of America;
5. Mountain Bell; and
6. NYNEX.

Filing Reply Comments:

1. Pacific Bell.

### PARTIES: BELLSOUTH PETITION FOR WAIVER

Filing Comments:

1. AT&T;
2. Bell Atlantic;
3. Cincinnati Bell; and
4. Pacific Bell.

Filing Reply Comments:

1. BellSouth.

## CONCURRING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

Re: In the Matter of Detariffing the Installation and Maintenance of Inside Wiring

The Commission's decision in the *Second Report and Order* in CC Docket No. 79-105 to complete deregulation of inside wiring installation and maintenance operations represented a major step in achieving long-standing and important Commission goals: ensuring that cost-causative customers bear the full costs, pursuant to the rigors of a fully competitive inside wiring market, of connecting their station equipment to the telephone network. While I believe that this Order properly resolves the various issues presented by the petitions for reconsideration of the *Second Report and Order*, my analysis for upholding preemption of inconsistent state action in this area diverges somewhat from that presented in this Order. I rest my decision to preempt state regulation of the provision of jointly used inside wiring on a single basis: the inseparability of the interstate and the intrastate components of the inside wiring which is here the subject of our detariffing action.

In its recent *Louisiana Public Service Commission v. FCC* decision, 106 S. Ct. 1890 (1986), the Supreme Court concluded that certain Commission preemptive actions relating to state depreciation practices for intrastate ratemaking purposes, constituted an impermissible federal intrusion into areas entrusted to state regulatory authorities pursuant to Section 2(b)(1), 47 U.S.C. Section 152(b)(1), of the Communications Act. While that decision underscored the scope of the separate sphere of regulation reserved to the states by virtue of Section 2(b), it also made clear that this provision of the Communications Act does not present an absolute bar to federal preemptive actions in all instances in which a matter falls within the purview of Section 2(b)(1). The Court recognized that federal preemption of state regulation undertaken pursuant to the Section 2 (b) (1) reservation was permissible, "where is [sic] was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." 106 S. Ct. at 1902, n. 4.

It was on the basis of this principle that the Court distinguished its decision to invalidate the Commission preemptions relating to depreciation practices – accounting operations which could be individually applied to the separated costs by the intrastate and interstate jurisdictions – from earlier court decisions upholding preemption of state customer premises equipment (CPE) regulation. In the latter case, in the absence of separate networks and CPE for interstate and intrastate purposes, the state prohibition on subscriber CPE interconnection would have effectively negated the federally granted interconnection rights and standards governing the same dual-jurisdiction use equipment.

In the case now before us, the inside wiring, like CPE, is a physical asset used jointly for the provision of interstate and intrastate services. As in the case of CPE, the Commission has now also determined with respect to inside wiring, that continued regulation and tariffing of inside wiring operations would distort the rates for basic transmission services, interfere with the consumer's right to purchase such wiring separately from transmission services, and undermine the integrity of a developing competitive marketplace for these goods and services. Thus, acting clearly within the scope of its authority over interstate communications, the Commission determined that the public interest will best be served if inside wiring installation and maintenance operations are obtained and performed in a fully competitive, deregulated environment. It is clearly not possible to obtain this inside wiring and maintenance in a competitive environment where service offerings, prices and consumer choice are driven by true economic and marketplace factors alone, if part of the costs are being included in basic service rates and the conduct of those operations made subject to state regulatory requirements.

Thus, absent preemption, if a state attempted to regulate inside wring under its Section 2(b)(1) powers in a manner which deviates from the competitive federal model, the only way in which an ordinary subscriber could satisfy both schemes (in the absence of an explicit waiver or exemption from that scheme granted by state or federal regulators), is to have two sets of inside wiring, each obtained and maintained pursuant to the different regulatory regimes and dedicated to a single jurisdiction. As the Order discusses in paragraph 18, this is the sort of extreme, inefficient result that warrants preemption, consistent with the dictates of the Communications Act, long-standing case precedent, and the *Louisiana Public Service Commission* decision. Because I believe the foregoing discussion represents the appropriate and sufficient basis for federal preemption in this case, I find it unnecessary to consider the alternative ground for taking this action set forth in the Order and express no opinion on the merits of the analysis presented therein at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

November 18, 1986

BY DIRECTION LETTER

Twentieth Holdings Corporation
c/o Thomas R. Herwitz
5151 Wisconsin Avenue, N.W.
Washington, D. C. 20016

Released: November 25, 1986*

Gentlemen:

This refers to the application (BTCCT-860918KK) for Commission consent to transfer control of WXNE-TV, Inc., licensee of Station WXNE-TV, channel 25, Boston, Massachusetts, from The Christian Broadcasting Network, Inc. to Twentieth Holdings Corporation (THC).[1] News Group Boston, Inc., a subsidiary of THC, owns and publishes *The Boston Herald*, a daily newspaper located in Boston. Since the Grade A contour of WXNE-TV encompasses the community where the newspaper is published, acquisition of WXNE-TV by THC is prohibited by Section 73.3555(c)(3) of the Commission's Rules. You have requested a period of 18 months from the date of consummation of the transfer to achieve compliance with the Commission's cross-ownership rules.

In support of your request, you maintain that a temporary waiver is fully consistent with the public interest and precedent. In the past, you state, the Commission has granted temporary waivers of reasonable duration to alleviate the threat of a distress sale. *See Metromedia Radio & TV*, 102 FCC 2d 1334 (1985), *recon. denied*, 59 RR 2d 1211 (1986), *appeal docketed, sub nom. Health and Medicine Policy Research Group v. FCC*, D.C. Cir. No. 85-1837; *Golden West*, 59 RR 2d 125 (1985). Because Boston is one of only a few markets where there are competitive daily newspapers, you argue that threatening that competitive environment by a distress sale would not serve the Commission's goal of promoting diversity of viewpoints. Thus, the grant of a temporary waiver, you claim, would minimize the adverse effects on the competitive viability of *The Boston Herald* which might otherwise result from the creation of a distress sale atmosphere, and would protect against an environment harmful to employee morale. Moreover, you aver that permitting a reasonable period of time for divestiture of the newspaper would allow for a more diverse group of prospective buyers, including local buyers and minorities who may need additional time to secure necessary financing. You further contend that a grant of the waiver would allow the newspaper to be sold under terms and conditions reasonably reflecting its true market value and would promote diversity without undue distortions of marketplace forces. Finally, you state that the impact of any temporary diminution of diversity is minimized by the presence of numerous media outlets in Boston (7 daily newspapers, 7 television and 25 AM and FM radio stations).

Based on the above representations, we believe that a temporary waiver of Section 73.3555(c)(3) is consistent with the public interest and Commission precedent. In view of the numerous media outlets serving Boston, no undue concentration of the media would result from a limited waiver. Moreover, we recognize that market factors associated with sales of daily newspapers may be different from those affecting broadcast properties, possibly them more difficult to sell. Therefore, we believe that a waiver for a period of 18 months would be appropriate here. The purposes of diversity would not be served by compelling an immediate sale of the newspaper which may eliminate all potential buyers except those with immediate access to a large amount of capital. By permitting a reasonable time to find qualified buyers, we increase the possibility that others, such as independent local entities, may come forward, thereby encouraging diversity in the ownership of the mass media. *See Metromedia Radio and TV*, above.

Accordingly, the applications of The Christian Broadcasting Network, Inc. assigning the license of WH23 and transferring control of WXNE-TV, Inc., licensee of Station WXNE-TV, Boston, Massachusetts, to Twentieth Holdings Corporation, ARE GRANTED, subject to the condition that Twentieth Holdings Corporation and its principals divest themselves of their interests, direct or indirect, in *The Boston Herald* no later than 18 months from the date of consummation of this transaction.

BY DIRECTION OF THE COMMISSION

William J. Tricarico
Secretary

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Commission Record.

FOOTNOTE

[1] The Christian Broadcasting Network, Inc. has also submitted an application concurrently assigning its earth station authorization for WH23 to WXNE-TV, Inc. (File No. 002550-DSE-AL-86).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COLUMBIA COMMUNICATIONS CORPORATION

Application for Authority to Construct, Launch and Operate a Transpacific Satellite System. File No. CSS-86-002-LA

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: December 2, 1986; Released: December 18, 1986**

By the Commission:

1. On March 14, 1986, Columbia Communications Corporation (Columbia) filed an application for authority to construct, launch and operate a transpacific satellite system which would link portions of North America and Asia.[1] The system proposes to serve the major cities in the western continental United States, Alaska, Hawaii, western Canada and Japan. Columbia requested that the United States reserve with the International Telecommunication Union (ITU) the orbital position at 165° west longitude (W.L.), and it requested the authority to construct a spare satellite for the system. We placed the application on public notice on March 26, 1986. No comments were filed. We grant Columbia's application for the reasons set forth below.

2. Columbia proposes to operate one in-orbit Ku-band satellite located at 165° W.L. and to have one ground spare. The proposed satellites each will have forty-four transponders which would be sold or leased on a long-term non-tariffed basis. The transponders would be used for data distribution and collection, video and voice transmissions, and interactive video and audio transmissions. The system would link Japan and the U.S. and would provide spot beams to Alaska and to Hawaii. In the future, Columbia may link the Pacific and the Atlantic regions in a single system if it is granted authorization to serve the Atlantic Ocean region. To achieve this link, Columbia has several alternative plans: it may operate its own Atlantic satellite if it seeks and obtains authorization in the future; it may purchase or lease transponders from another Atlantic operator; or it may use transatlantic cables.

3. The system will use the frequency bands 12/14 GHz in the United States and 11/14 GHz overseas. Thirty-six of the satellite's 44 transponders will have 36 MHz of usable bandwidth per channel, while eight of the transponders will have 54 MHz of usable bandwidth per channel. The satellite beam will employ uplinks in the 14 to 14.5 GHz frequency band. Twenty-two uplink transponders will serve the continental United States and twenty-two will serve the overseas markets. Similarly, there will be 22 downlink transponders to serve the United States in the 11.7 to 12.2 GHz band and 22 downlink transponders to serve overseas locations in the 10.7 to 11.2 GHz band. Launch will be either on the Arianespace system or on NASA's space shuttle.

4. Columbia plans to construct an operations control center and a tracking, telemetry and control (TT&C) facility near Las Cruces, N.M. and a back-up TT&C facility at an unspecified location. For the initial stages, Columbia plans to lease tracking stations from existing satellite control networks, both in the United States and overseas.

**Discussion**

5. In our *Separate Systems* decision,[2] we established a policy for regulatory consideration of applications for international satellite systems separate from INTELSAT. We decided that establishing separate systems subject to certain Executive branch service restrictions would provide substantial benefits to users of international satellite communications services. We found that separate systems would stimulate technological innovation and service development, would improve network efficiencies, would reduce user costs, and would create new business and trade opportunity. We concluded that separate systems will permit users who have special communications needs to meet those needs with the new methods for packaging and for transmitting information.

6. Under the service limitations adopted in our *Separate Systems* decision, separate systems are restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public switched networks (except for emergency restoration service). We concluded that these restrictions were necessary to provide reasonable assurance that the entry of these new systems would not cause significant economic harm to INTELSAT. These service limitations protect INTELSAT's core revenues, which are obtained from supplying space segment capacity for international switched message services.

7. In reviewing a separate system application, we determine whether the proposal is consistent with the service limitations we set out in the *Separate Systems* decision, whether it meets the requisite legal, financial and technical qualifications of Title III of the Communications Act and of our *Separate Systems* decision, and whether it otherwise satisfies the public interest standard of the Communications Act. We will issue an initial construction permit to an applicant who satisfies these standards. However, we will not issue a license permitting any separate system applicant to begin operating its proposed system until the United States has completed coordination of that system with INTELSAT under Article XIV (d) of the INTELSAT Agreement.

8. We find that Columbia's proposed system complies with the service limitations we imposed in our *Separate Systems* decision. Columbia states that it would offer its transponder capacity to customers abroad and in the United States on a non-common carrier basis for communications not interconnected with public switched message networks. The users of Columbia's system would purchase or lease transponders. Columbia also states that all operating agreements, sales contracts and lease agreements will contain language stating that both parties would take necessary measures to enforce the restriction barring interconnection as required in our *Separate Systems* decision.

9. Additionally, since Columbia will operate within the confines of the Executive branch service limitations, its proposed system should not cause significant economic harm to INTELSAT. In our *Separate Systems* decision we restricted our analysis to the Atlantic Ocean region because that was the area to be served by the proposed systems under consideration at the time. In that decision, we found that, with the restrictions we imposed, at most only 2.0 percent of INTELSAT'S revenues would have been accessible to separate systems at 1984 revenue levels.[3] We later revised this estimate to include service revenues in the Pacific Ocean region[4] and occasional television revenues in the Atlantic and Pacific regions.[5] This increased the percentage of revenues potentially affected to 6.5 percent.[6] We recently revised the estimate to include the occasional use of "all other services" not interconnected with the public switched network which raises INTELSAT's accessible revenues to 6.77 percent.[7]

10. In this proceeding, we estimate the portion of INTELSAT's global revenues accessible to Columbia's Pacific system to be 2.3 percent. This estimate is derived from an INTELSAT revenue schedule for 1985, and includes revenues from private line service, circuit restoration service, leased international television service, occasional television service and "other services" in the Pacific Ocean region. Revenues from these services amounted to $ 9,473,265 in 1985. We also estimate here that, during the period 1986 to 1999, the effect of Columbia's system on INTELSAT's global traffic forecasts will be in the range of about 1.0 percent.[8] Our finding that Columbia's proposal will not cause significant harm to INTELSAT is consistent with our findings in previous decisions granting separate system applications.[9]

11. Further, as in those previous decisions, we find that authorizing Columbia's proposed system will provide benefits to users. We find that the type of transmission services that Columbia will offer differ from services offered or planned by INTELSAT in satellite downlink power, in coverage and/or connectivity. We further find that applying competitive pressure to INTELSAT within limited service areas will result in the further development of this market and will encourage service innovation. Columbia's proposed system will offer customers an alternative supplier to fulfill their special needs.

12. Columbia proposes to both sell and lease its space segment capacity. Selling or leasing space segment capacity on a non-tariffed basis will provide international users with the same benefits that domestic users now enjoy. This will enable customers to make long-term plans for the use of facilities with assurance as to facility availability and price. It will result in development of new and innovative service offerings, and it will reduce user costs. Additionally, private sale of space segment capacity will permit the providers of capacity to make tailored and flexible arrangements that are not possible under a tariffed service offering.

13. The users of Columbia's system would gain access to the system by using small aperture earth station antennas, measuring three meters or less, located at the customer's premises. Using a small earth station would reduce customers' costs by eliminating the need to use national gateway earth stations and expensive terrestrial facilities between those stations and the customer's premises. The proposed system would provide users with greater operational flexibility and security because the customer would choose the location of the earth station and would operate the earth station. These factors along with Columbia's sale or long term lease of transponders would permit the user to design a customized communications network.

14. Columbia has the requisite legal qualifications to become a licensee. Columbia is a U.S. corporation organized with the purpose of developing new satellite communications markets and services. It was incorporated in the state of Delaware on October 26, 1983, and conducts business in Hawaii. Columbia Astronautics Corporation owns 100 % of the Columbia's shares.[10] Columbia states that approximately 85 % of the stock has been set aside to satisfy the potential requirements of a convertible debenture bond offering. The officers and directors are the same for both Columbia and Columbia Astronautics.[11]

15. We also find that Columbia satisfies the first stage of the two-stage procedure that we adopted in our *Separate Systems* decision for considering the financial qualifications of a separate system applicant. Under this procedure, an applicant will not be authorized to begin construction until it demonstrates that it is financially prepared to assume the costs and liabilities involved in constructing, launching and operating the proposed system for one year. The applicant must show its current financial ability to meet the costs and expenses of planning, constructing, launching and operating its proposed system. However, in view of the fact that an applicant must undergo the INTELSAT consultation process, and due to the resulting uncertain status of the application pending this process, the applicant is unlikely to receive firm financial commitments. Therefore, for applicants which meet certain "first stage" minimal criteria, we will issue a construction permit setting forth the approved technical parameters of the proposed system for purposes of INTELSAT technical consultation under Article XIV (d).

16. The first stage criteria include a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space station(s); (2) the estimated operating expenses for one year after launch of the proposed space station(s); and (3) the source(s) or potential source(s) of funding the proposed system for one year, which might include the identity of financiers and their letters of financial interest. Columbia satisfies these criteria. It estimates that total capital costs for its system and first year operating costs will be approximately $ 204 million. Columbia's estimated costs are itemized as follows:

| | |
|---|---|
| Construction of satellite | $ 55 M |
| Launch services | $ 60 M |
| Preoperational, engineering and general initial expenses | $ 10 |
| Satellite ground spare | $ 55 M |
| TT&C construction | $ 12 M |
| Space segment and TT&C | $ 6 M |
| Estimated operating expenses for one year | $ 6 M |
| Total | $ 204 M. |

17. To meet these costs, Columbia expects to use a combination of bank financing, transponder sales, and equity financing. Columbia has submitted a letter from the Bank of America stating its interest in financing the proposed project for an amount not to exceed $ 280 million. Columbia also has submitted a letter from Unilease Aerospace Corporation which gives qualified sup-

port for Columbia's financing plans. The letter states that Columbia should be able to finance the sale of its transponders through sale and lease-back arrangements, provided that the seller-lessors are credit worthy, and provided that there are no significantly adverse changes in either the financial markets or the market for satellite communication facilities.

18. In view of this showing, we are issuing Columbia construction permit conditioned on Columbia's subsequent submission of the requisite "second stage" financial information. Columbia may not begin construction until it demonstrates its current ability to meet the costs of construction and launch, and its operating expenses for one year after launch.[12] This requirement applies to all entities including newly established entities such as Columbia. As provided by the procedures set out in our *Separate System* decision, Columbia must meet this requirement no later than 60 days following the receipt by the Commission of the State Department's letter stating that the United States has fulfilled its Article XIV (d) obligations and that the Commission may proceed with final authorization of the proposed system. At that time, we will issue an order permitting Columbia to begin construction. However, it may begin construction prior to receipt of the State Department's letter if the applicant can satisfy the second stage requirements prior to that time. If the conditions of the second stage are not timely satisfied, or if they are untimely satisfied without good cause shown, the conditional construction permit will become null and void and the orbital location tentatively assigned to Columbia will become available for reassignment. Once either the conditional construction permit or Commission order permitting construction by the applicant is issued, Columbia bears all the risks and liabilities in commencing construction of its satellite system pending final Commission issuance of launch authority and a license to begin operation.

19. Finally, Columbia's proposed system satisfies the technical requirements of our *Separate Systems* decision. Columbia proposes a high power HA-393 satellite which will be equipped with one transmit and one receive beam for service to the continental United States and one transmit and one receive beam for service to the Pacific. Columbia plans to provide four times frequency reuse in capacity using spatial separation and polarization discrimination. The satellites will be designed with a ten year life. The power and attitude control systems will have built-in redundancy to ensure reliability. Battery capacity will be sufficient to power the satellite during eclipse outages.

20. We have evaluated the space station facilities proposed by Columbia with respect to the technical standards and policies we adopted in the *Separate Systems* decision. The original application did not correctly calculate the maximum power flux density (PFD) of the space station to demonstrate compliance with the limits of the international Radio Regulations and the Commission's rules. Amendments to the application now demonstrate compliance with the regulations.

21. With respect to compliance with the PFD limits of the international Radio Regulations, Columbia, in its original application, listed three different figures for the energy dispersal bandwidth used in calculating the PFD, none of which corresponded to the figures used in the PFD calculations. In its first amendment, Columbia indicated it would use an energy dispersal bandwidth of 1.5 MHz, and calculated a PFD of -140.4 dB($W/m^2$) for the Japan beam. This figure would comply with regulations if the minimum elevation angle were twenty-five degrees, as claimed by Columbia. Since the earth's horizon is included in the -2 dB gain contour of the subject beam, the actual angle of arrival of the emissions is zero degrees, and the applicable PFD limit is -150 dB ($W/m^2$). Columbia in its second amendment, demonstrated it would be able to meet this specification by increasing the peak-to-peak frequency deviation of the energy dispersal from 1.5 MHz to 9.55 MHz, thereby reducing the PFD by 8.1 dB and by reducing the power in the Japan beam by 1.5 dB. This total reduction of 9.6 dB brings Columbia's space system into compliance with PFD limits. In this and all other respects, we find that the proposed facilities meet our technical standards.

**Conclusion**

22. We find that Columbia's application is consistent with the service restrictions we set out in our *Separate Systems* decision. Further, we conclude that Columbia is legally, financially and technically qualified under Title III of the Communications Act and the *Separate Systems* decision to provide international satellite services. We also find that the grant of Columbia's application would be consistent with the public interest, convenience and necessity under section 309 (a) of the Communications Act of 1934.

23. Accordingly, under sections 4 (i) and (j), 151, 308, 309 and 319 of the Communications Act, as amended, IT IS ORDERED that the application of Columbia Communications Corporation to construct one in-orbit satellite and one ground spare satellite, File No. CSS-86-002-LA, IS GRANTED, subject to the terms and conditions of this conditional authorization, the technical specifications set forth in its application, and the formal instruments of authorization to be issued at a later date.

24. IT IS FURTHER ORDERED that Columbia shall not begin construction of the satellites until it has provided the Commission with a demonstration of its current financial ability to meet the costs of construction and launch as well as operating expenses for one year following launch. Columbia shall file this information with the Commission no later than 60 days after the Commission receives a letter from the Department of State which informs us that the United States has completed its Article XIV (d) obligations with respect to the proposed system and which informs us that we may proceed with final authorization of the system. Should these conditions not be timely satisfied upon the expiration of the sixty-day period following receipt of the State Department's letter, unless extended by the Commission for good cause shown, this conditional authorization shall become null and void.

25. IT IS FURTHER ORDERED that authorization to launch and operate the satellite will not be issued unless and until: (1) one or more foreign authorities authorizes use of the system and enters into consultation procedures with the United States party under Article XIV (d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm; and (2) the Department of State informs the Commission that the United States has completed its Article XIV (d) obligations and that the Commission may proceed with final authorization of the proposed system.

26. IT IS FURTHER ORDERED that as a condition of this order Columbia must file with the Commission copies of any operating agreements it enters into, within thirty days of their execution.

27. IT IS FURTHER ORDERED that the operation of Columbia's proposed system is restricted to providing services through the sale and long-term lease of transponders or space segment capacity for communications not interconnected with public switched message networks (except for emergency restoration service).

28. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the proposed system to ensure compliance with the service restrictions stated above.

29. IT IS FURTHER ORDERED that Columbia is temporarily assigned the orbital location at 165° west longitude for operation of its proposed in-orbit satellite.

30. IT IS FURTHER ORDERED that Columbia shall file with the Commission no later than one year from the release date of this conditional authorization information showing that it is making all reasonable efforts toward obtaining foreign approval provide services via its proposed system.

31. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Columbia does not confer any permanent right to the use of the orbit or spectrum and that the assignment is subject to change by summary order of the Commission on thirty days notice. Such a change may be ordered if the national security or the public interest requires it, or if any of the objectives or policies set forth in the Report and Order in the *Separate Systems* decision requires it. Neither this authorization nor any right granted by this authorization, will be transferred, assigned or disposed of in any manner, voluntarily or involuntarily. It must not be assigned by transfer of control of any corporation holding this authorization. It must not be transferred to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served.

32. IT IS FURTHER ORDERED that Columbia must comply with the Report and Order adopted in the *Separate Systems* decision, 101 FCC 2d 1046 (1985), CC Docket No. 84-1299, as modified by the reconsideration orders, FCC 86-144 (Apr. 17, 1986); FCC 86-471 (Nov. 5, 1986).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

## FOOTNOTES

[1] The application is filed under sections 214, 308, 309 and 319 of the Communications Act, 47 U.S.C. § 214, 308, 309 and 319, as amended.

[2] *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985). *Separate Systems Reconsideration*, 51 Fed Reg. 17631 (May 14, 1986) (summary only), FCC 86-144 (released April 17, 1986). *Second Separate Systems Reconsideration*, FCC 86-471 (released November 5, 1986).

[3] 101 FCC 2d at 1141 - 1142.

[4] Financial Satellite Corporation, FCC 86-13, File No. CSS-86-004-P-(LA) (released January 15, 1986) (unpublished).

[5] *Separate Systems Reconsideration*, FCC 86-144 (released April 17, 1986).

[6] The difference between our original estimate of 2.0 percent and the later estimate of 6.5 percent is primarily due to the addition of $ 10.3 million for occasional use television revenues for the Atlantic Ocean region in 1984.

[7] *Second Separate Systems Reconsideration*, FCC 86-471, CC Docket No. 84-1299 (released November 5, 1986).

[8] These figures were derived from INTELSAT's 1985 Traffic Data Base. We have not included INTELSAT business service (IBS) figures in this estimate because in its 1985 Traffic Data Base, INTELSAT appears to combine IBS traffic with intermediate data rate (IDR) traffic (some IDR services are interconnected with the public switched network and therefore not accessible to Columbia). These IDR forecasts cannot be combined with the other forecasts because IDR traffic is reported in 64 kbs digital units while other traffic is reported in 4 kHz analog units. Also, only a portion of the IDR figures is IBS traffic, but it is not possible to determine from the data how large a portion is IBS. Therefore, any estimate which includes IDR traffic will be over-inclusive because not all IDR service in the Pacific region will be accessible to Columbia. We note that IDR traffic is not a significant portion of INTELSAT's traffic.

[9] Pan American Satellite Corporation, 101 FCC 2d 1318 (1985); International Satellite, Inc., 101 FCC 2d 1201 (1985); Orion Satellite Corporation, 101 FCC 2d 1302 (1985) and unpublished order, File No. CSS-83-002-P (released September 6, 1985); Cygnus Satellite Corporation, 101 FCC 2d 989 (1985), File No. CSS-84-002-P-(LA) and unpub. order (released October 22, 1985); Financial Satellite Corporation, FCC 86-13 (released January 15, 1986) (unpub.).

[10] The largest shareholder of Columbia Astronautics is Clifford Laughton who owns 14.995% of the shares.

[11] One director of Columbia is a citizen of the United Kingdom. He is an "outside" director of both corporations, but he is not an officer of either corporation and he owns no stock interest.

[12] A demonstration of current financial ability to meet such costs and expenses would include the submission of a balance sheet, verified by affidavit, current for the latest fiscal year and documentation of any financial commitments reflected in the balance sheet together with an exhibit demonstrating that the applicant has current assets and operating income sufficient to meet its estimated construction, launch and operation costs and expenses. Newly established entities who are unable to submit a current balance sheet shall submit an exhibit indicating the estimated income or revenues anticipated from the proposed operation of the satellite system necessary to meet the estimated costs of construction, launch and operation along with any additional information requested by the Commission. Such additional information could include scheduled debt financing or stock issues, established lines of credit or other forms of internal financing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 86-467**

In the Matter of

Regulation of Small
Telephone Companies

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: December 4, 1986; Released: December 12, 1986**

By the Commission:

## I. SUMMARY

1. The United States Telephone Association (USTA) has petitioned this Commission to institute a rulemaking proceeding to reduce the administrative and regulatory burdens on small telephone companies. Our analysis of the petition and the comments received in response to the petition persuades us that, while federal regulatory burdens on small telephone companies are already modest, these burdens can be reduced further. Accordingly, in this Notice we propose rules implementing proposals developed by USTA, as well as additional initiatives which we believe will allow small telephone companies to file reasonable rates for interstate access service with minimal regulatory burdens.

2. As we discuss in this Notice, our present Rules allow small telephone companies to avoid all direct access tariff filing burdens by participating in the voluntary cost and revenue pools associated with the access tariff filed by the National Exchange Carrier Association (NECA). NECA calculates and files rates based on overall pool costs of over 1200 local companies, who in turn share in pool revenues in proportion to their costs. This Commission reviews the NECA rates as it does rates in other access tariffs.

3. In developing rules to reduce burdens upon small telephone companies that choose not to participate in the voluntary NECA pools, but instead file their own access tariffs, we believe that two basic tests should be met. First, the individual rates should continue to be reasonable. That is, the reduced filing requirements should be "rate neutral."

4. Second, we believe that participation in the voluntary NECA pools provides many benefits to small telephone companies, including effective insurance against risks and consolidated administrative support. Any proposal to reduce filing requirements for small telephone company access tariffs should neither encourage nor discourage participation in the NECA pools. In other words, the proposal should be "pooling neutral."

5. A proposal developed by USTA (which we propose in this Notice) allowing small companies to file access rates based upon their most recent cost studies, if available, or upon national average schedules does, we believe, meet these tests while significantly reducing filing requirements. Small companies would only need to demonstrate their actual historical costs or reference average schedule costs, rather than, as now, to submit full cost support including a past year cost of service study and a projection of costs in the future year.

6. In addition, we propose rule changes to allow small companies to reduce the burdens of calculating demand and filing tariff terms and conditions. In our proposed rules we expand the USTA proposal to allow small companies to use actual historical demand figures to calculate rates. We also propose to require NECA to file a tariff containing only access tariff terms and conditions, which will permit small companies to reference that tariff while filing a simplified schedule of individual, non-pooled rates. Use of this tariff in conjunction with the USTA proposal allowing rates to be set on the basis of historical costs should allow small telephone companies rate flexibility with minimal tariff administrative costs.

7. Three additional initiatives to aid small companies are included in this Notice. First, we propose to require small companies to revise their access tariffs every second year, rather than yearly as required by the present Rules. This will reduce required filings, and thus the associated burdens, substantially. Second, we propose to eliminate the data filing requirements and refund liabilities required by Rules adopted in CC Docket No. 84-800,[1] for small companies that elect to use historical costs and demand to calculate access rates. Third, we propose to expand the definition of a small telephone company to those with not more than 50,000 lines, rather than the threshold of 20,000 lines proposed by USTA. Further comment is requested on other approaches to reducing regulation of small companies.

8. Overall, we believe that the USTA proposal, as further developed and expanded by these proposals, should reduce this Commission's regulation of small telephone companies to minimal levels necessary to ensure reasonable rates and to retain the benefits of the voluntary NECA pools for those small companies that elect to participate in them.

## II. PROCEDURAL HISTORY

9. On February 18, 1986 USTA filed a Petition for Rulemaking (USTA Petition) which requested that this Commission institute a rulemaking proceeding to reduce the administrative and regulatory burdens on small telephone companies (defined in the USTA Petition as those which serve 20,000 or fewer access lines) and to amend Part 61 of this Commission's Rules, especially with regard to the tariff support provisions in Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, as applied to interstate access tariffs.

10. The petition specifically requested that this Commission declare small local exchange carriers (LECs) nondominant with respect to their traffic-sensitive access tariffs and accord them the streamlined regulation applicable to non-dominant carriers, that is, the tariff filings would be presumptively lawful, could be filed on 14 days' notice and need not be accompanied by extensive economic support data.[2]

11. To qualify for the streamlined treatment, USTA initially proposed that a carrier's proposed rate could be no higher than 20 percent above a target rate established by taking the average of three non-Bell holding telephone

companies with tariffs on file at this Commission. In its Reply Comments, USTA has amended this guideline by proposing that carriers qualify for streamlined treatment if their proposed access rates are no higher than either the most recent available, weighted average of the rates of the three largest non-Bell holding companies with tariffs on file with this Commission or the most recent effective rate established by NECA. *See* USTA Reply Comments at iii. USTA asserts that the current tariff filing requirements are unduly burdensome as applied to the smaller independent telephone companies and not in the public interest. USTA suggests that streamlined regulation may lower access charge revenue requirements which ultimately could have the effect of reducing access charges to interexchange carriers. USTA therefore requests that this Commission revisit its determination in the *Competitive Carrier Docket* [3] that all exchange carriers are dominant. USTA also contends that reduced regulation is consistent with the objectives of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980).

12. On February 27, 1986, we issued a Public Notice seeking comments from all interested parties regarding the petition.[4] Comments and reply comments were filed on March 31, 1986 and April 21, 1986, respectively. Comments were received from over 40 parties.[5] Overall, the comments are supportive of USTA's petition, at least with respect to the overall purpose of reducing regulatory burdens on small companies. The comments are virtually unanimous in supporting reduced small company regulation in principle. MCI is the only party that opposed the petition. However, the basis for MCI's dissatisfaction is shared by many of the other commenters, *i.e.*, most of the commenters do not support USTA's request that small telephone companies be reclassified as non-dominant. Additionally, some large telephone companies request that we consider reducing the regulatory burdens of all telephone companies, irrespective of size. Some of the commenters request that we define a small telephone company as a carrier which provides access service to 50,000 or fewer access lines. Other commenters raise the question of whether the ceiling should be applied on the basis of the size of the local exchange, the study area, the operating company, or the holding company.

## III. BACKGROUND:

### CURRENT REGULATORY BURDENS AND BENEFITS FOR SMALL TELEPHONE COMPANIES

13. It is a firm policy of this Commission to reduce burdens upon the telephone companies it regulates so far as possible, consistent with our responsibilities under the Communications Act. In order to understand and evaluate the USTA proposal, however, it is necessary to review past Commission efforts to reduce those burdens, and to identify the actual present burdens which our Rules impose.

14. While regulation of the small telephone companies as intrastate exchange carriers is primarily a matter left to the states by the Communications Act, this Commission regulates the rates, terms, and conditions for providing the local access needed to originate and terminate interstate calls and lines. *See* Sections 2(b) and 203 of the Act, 47 U.S.C. §§ 152(b) and 203. These regulations, codified in Part 69 of the Commission's Rules, 47 C.F.R. Part 69, were specifically intended to impose minimal regulatory burdens upon small telephone companies. NECA was established to administer the recovery of local non-traffic sensitive (NTS) costs by pooling costs and revenues and filing the carrier common line (CCL) rates, based on costs in the common line (CL) pool not recovered by end user charges and other rates. In addition to this mandatory pool, NECA also was chartered to administer voluntary pools for end user common line (EUCL) and traffic sensitive (TS) costs and revenues, primarily as a service to small telephone companies. By requiring NECA to file tariffs based on the pooled costs of all EUCL and TS pool members, this Commission eliminated all direct tariff filing burdens on pool members. These telephone companies participating in the NECA pool file no tariffs or cost support with this Commission, and require no administrative staff to handle relations with this Commission. These functions are performed on behalf of the pool members by NECA.

15. The indirect regulatory burdens for small telephone companies participating in the NECA pools also appear relatively modest, and are in general far outweighed by benefits. All companies must report costs and demand to NECA in order to recover their NTS costs through the CL pool and provide information for NECA tariff filings. None of the small companies filing comments in this proceeding propose changes in the mandatory CL pool for both small and large companies, which helps to support high cost local companies and maintain universal service. The additional burdens on small company members of EUCL and TS pools of reporting these costs and demands are relatively small. None of the comments indicates any difficulty in meeting such burdens. The benefits to small telephone companies are substantial. A single administrative staff handles costs and revenues for over 1200 members of each voluntary pool. This staff represents the NECA members before this Commission, while passing on necessary information to the small companies.

16. Because the small companies participate in cost and revenue pools, they also face substantially reduced risks and are virtually guaranteed a steady interstate return. A small company which files its own tariff could experience significant swings and potential losses in interstate revenues if it underestimated its future costs or demand. For example, because access charges are assessed on actual usage, a small company could face abrupt losses in revenues if a large customer reduced its traffic by relocating or switching to a bypass facility. A small company whose local exchange facilities are disabled by a natural disaster or an accident would face even greater revenue losses. The NECA pool mechanism, which bases compensation to the small telephone companies on their interstate costs, provides an effective insurance policy against such unforeseen events. This insurance policy also, of course, extends to small telephone company subscribers, who are protected against the increases in local rates which might otherwise be forced on them under these circumstances. The NECA pooling arrangement thus promotes the important goal of universal service.[6]

17. This effect is achieved at a modest cost to small telephone companies. It is almost certainly more efficient for NECA to handle these functions than for each individual telephone company to do so, especially since NECA's voluntary pools share the overhead costs and administrative resources used to manage the mandatory pool.[7] The voluntary NECA pools have also been success-

ful in practice. Over 95 percent of all small telephone companies are members of both voluntary pools and the voluntary pool rates filed by NECA have always become effective without reduction.

18. Thus, the overall effect of the Commission's establishment of NECA and the voluntary pools is to allow small companies to enjoy the efficiency and coordination of a large company, while remaining independent. Because the use of a single administrator is no doubt more economical and the costs in any event are recovered through CCL rates (assessed overwhelmingly by larger companies), total access costs have been held down, along with the long distance rates to customers.

19. This Commission also allows both small and large telephone companies to file their own tariffs for most access elements if they choose to do so.[8] A company which does choose to file its own interstate access tariff thus takes on regulatory burdens not otherwise required by our Rules. These burdens may nevertheless be accompanied by corresponding benefits. For large telephone companies, the additional administrative costs are likely to be a relatively small part of overall costs and the company's tariff and rates may more accurately reflect the company's operations. Relatively low cost small companies may be able to provide lower EUCL rates to their multiline business and private line customers. They also avoid the indirect regulatory burdens of participating in the voluntary pools and can tailor their tariffs to reflect their local operations and to conform with state tariffs.

20. As we stated at the outset, this Commission is committed to reducing regulatory burdens so far as possible. Our decision detariffing interstate billing and collection services, effective January 1, 1987,[9] has allowed the elimination of 11 tariffs formerly filed by telephone companies, which applied only to billing and collection.[10] The effect is to eliminate all direct regulatory burdens for those companies. Our recent decision in CC Docket No. 85-308 reduced or eliminated requirements upon small telephone companies for filing information with the Commission.[11] In its development of filing requirements for access tariffs, the Common Carrier Bureau has also adopted substantially less burdensome requirements for small telephone companies who choose to file their own tariffs.[12] We welcome the opportunity presented by the USTA filing and the comments to consider whether additional reductions of the regulatory burdens for small telephone companies who choose, voluntarily, to file their own interstate access tariffs are feasible.

## IV. DISCUSSION

### A. The USTA Proposals

21. USTA contends that current filing requirements, as applied to small telephone companies, are unduly burdensome. The major purpose of the petition is to reduce the requirements under our current Part 61 and Part 69 Rules for the filing of access tariff rates by those companies. USTA contends that while the Part 69 Rules allow small companies to file their own Traffic Sensitive (TS) rates for switched and special access, the present filing requirements make such filings so expensive as to, in practice, preclude small companies from doing so.

### B. Approaches to Reducing Burdens Upon Small Telephone Companies

22. Unnecessary regulatory burdens increase costs and rates: our goal is to minimize regulatory costs, consistent with the public interest and our statutory responsibilities. On the other hand, eliminating regulations necessary to assure reasonable rates, or adopting a regulatory scheme which would reduce or destroy the benefits of the current access plan would contravene our basic statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges " Section 1 of the Communications Act, 47 U.S.C. § 151.

23. Specifically, our tentative view is that proposals for reducing regulatory burdens upon small companies should meet two basic tests. First, they should be rate neutral. By this we mean that our primary concern in regulating small telephone companies is to ensure that their access rates are not unreasonably high. Achieving that goal with some form of reduced regulation would clearly be desirable. The second test reflects the fact that the existing NECA pool arrangement is, on the face of it, adequate to meet the needs of the small companies, more efficient and less costly than multiple filings, and desirable for protecting small companies and fostering universal service. A proposal to reduce access tariff filing burdens for small companies should not provide perverse incentives for small companies to leave the NECA pools. That is, it should not encourage small companies to assume the additional direct burdens of filing their own tariffs in order to obtain some result that does not serve the public interest.[13] At the same time, it should not discourage small companies from filing their own tariffs if the benefits of a tariff tailored to the company's specific needs free of the indirect regulatory burdens of NECA pool membership outweigh the additional burdens of a such a filing and the loss of the benefits of pool membership. In other words, in addition to being rate neutral, we believe the proposal should be pooling neutral.[14]

24. USTA's initial proposal that small company rates be allowed without support if they are no higher than 20 percent above the average of three non-Bell holding companies with tariffs of file at this Commission would have run afoul of the first test and probably the second. This proposal would plainly give small companies an incentive to file rates which bear no relationship to their actual costs in order to earn far higher profits than they need to operate and provide service to their customers. AT&T estimates that, on a worst case basis, this proposal could increase its access expense and thus its long distance rates by $50 million.[15] Other long distance companies would experience corresponding increases in costs. Because this option would apparently be available only to small companies who had left the NECA pool, it would also create a strong but artificial incentive for companies to do so.

25. In its reply comments, USTA did not dispute the AT&T calculation and agreed that an adjustment to its proposal is appropriate to avoid the potential for disproportionate rate increases. It therefore proposes that the rate cap be changed to a level no higher than either (1) the most recent available weighted average of the rates of the three largest non-Bell holding telephone companies with effective tariffs on file at this Commission; or (2) the most recent effective rate established by NECA in its tariff. USTA estimates that this proposal would cause a net annual increase to AT&T of $9 million on a worst case basis.[16]

26. This proposal, of course, more closely approaches rate neutrality, but still would implement excessive rates.[17] It would also encourage exit from the NECA pool without good cause. Any small company with costs below the average could charge the same rate as NECA to its customers, but would obtain a higher return than warranted by its costs or provided by the NECA pool settlement. The likely exit of these low cost carriers would then increase the average costs and rates of NECA pool members in the next year, which would in turn both encourage the exit of members with costs below the new, higher average, while also allowing those carriers exiting earlier to increase their rates. Over time, as this effect occurred year by year, it could be expected that this unstable arrangement would lead to access rate increases to AT&T and other interexchange carriers well above the amounts in the initial year.

27. In further discussions with the Commission staff, USTA has made a further and much improved proposal. Under this proposal, a small company would qualify for reduced regulation if it filed rates which in the first year used the amount of the company's most recent settlement from the NECA pool or the company's most recent cost study. Any subsequent filing would propose rates using the company's most recent cost study, most recent average schedule settlement, or the most recent adjusted average schedule rate developed by NECA. This proposal, by basing rates on the company's own costs, should be rate neutral. There would be some lag in the process of rate-setting, because the rates would be based on past rather than projected data, but this would not introduce any apparent systematic bias upward, and should be corrected at the time of the company's next cost study or the next average settlement calculation.

28. This proposal would also appear not to encourage unnecessary exits from the NECA pool. Those carriers filing tariffs would set rates based on their own individual costs or those costs which would be the basis for their settlements if they remained in NECA. On the face of it, they should neither gain nor lose from the proposal, based upon their decision with regard to participation in the NECA pool and tariff.

29. Moreover, we believe that this basic concept can be expanded to reduce aspects of small company filing burdens other than development of costs. First, the USTA proposal essentially discusses only tariff rates. Of equal importance to actually providing access services are the terms and conditions under which service is provided, including such matters as the definitions of terms, the provisions for ordering and terminating service, and the respective responsibilities and liabilities of the exchange carrier and its interexchange carrier customers. USTA suggests that a small company could adopt a simplified version of the NECA tariff, using provisions applicable to its own operation, join with other carriers to hire a consultant, or adopt the non-rate terms and conditions of NECA's tariff and insert its own rates, all as less expensive alternatives to filing its own individual tariff.

30. While each of these options would be open to small carriers, each would also involve burdens which we believe can be reduced while still allowing individual carrier rate flexibility. We believe this can most easily be accomplished by directing NECA itself to file a simplified access tariff for small carriers which would contain only tariff terms and conditions. A small carrier could then indicate its rates for the services it offers in a separate rate schedule filing, referring to the terms and conditions applicable to those services. This further step beyond the USTA proposal should, we believe, further reduce the burdens upon small carriers by minimizing additional administrative costs. But it would also give the carriers rate flexibility. We anticipate that NECA will also be able to provide advice and other forms of administrative support to enable small companies to file these rates with a minimum of outside help and expense. Under our proposed approach, small companies also would retain the other options mentioned by USTA.

31. The USTA proposal also deals only with the costs of access. In order to set access rates, the carrier also must calculate its demand. An error in the demand calculation would produce rate errors to the same degree as an error in costs, and demand is likely to be even more difficult for an exchange carrier to estimate accurately.

32. A reasonable way to deal with this problem, which is consistent with the USTA proposal and would produce a further reduction in tariff filing burdens, would be to allow small companies to set rates based on past year costs and demand, without requiring projections of those figures into the future period in which the rates will be in effect. Because both cost and demand should be actual figures, the issues presented by such filings should be greatly reduced. Although the rates will be somewhat inaccurate, because they would not reflect changed circumstances, this should be a minor problem in the case of the small companies who would be subject to this approach. Filings for the next period should correct this distortion, and cost and demand projections for small companies are likely in any event to be difficult and less accurate than projections based on the larger data universes of large carriers. The effects on overall industry rates and on long distance rates to customers should also be minimal. For these reasons, we propose that small company filings which use actual past period cost and demand figures or average schedules[18] to compute access tariff rates be considered *prima facie* reasonable. Such rates would not be suspended absent a substantial showing that the rates are unreasonable, that there would not be any practical or sufficient opportunity to correct the unreasonable rates in a subsequent filing, and that irreparable injury would result.

33. Rates based on historical costs and demand or average schedules also would not present the concern that the rates could exceed the allowed rate of return because of faulty projections. Subsequent filings based upon current costs and demand, or revised average schedules, should automatically correct the rates. For this reason, we also propose to eliminate the data filing requirements and the liability for automatic refunds established in Docket 84-800 for small companies that elect to use this approach.

**C. Other Proposed Reductions in Small Company Burdens**

34. In addition to the USTA proposal, as modified by USTA and as expanded above, we also are proposing other approaches to reducing small telephone company burdens.

35. First, we believe that it should be possible to reduce the frequency of access tariff filings for small telephone companies without significant harm to the public or to the companies themselves. Currently, each company filing an access tariff is required to file new rates annually,

based upon studies of costs and demand for the most recent past year and for the future test year in which the rates are to be effective. Under the rules adopted in Docket 84-800, rates which prove excessive during a two-year period are subject to automatic refunds during the subsequent two-year period. We believe that it would be desireable to eliminate the requirement that small telephone companies access filings be made annually, and require filings only every other year, coinciding with the beginning of the Docket 84-800 accounting period. Small companies would retain the option of filing revisions within that period, but there would be no requirement that they do do. We expect that filing requirements for updates within the accounting period would be modest. The use of a two-year period should not, we believe, result in significant rate distortions. We might consider proposals for even less frequent filings; however, it might well be perilous for a small company to leave its rates unchanged and unexamined for a longer period, especially in view of the potential refund liability under Docket 84-800.[19]

36. With one modification, we believe that this approach can also be extended so as to reduce the indirect burdens of NECA pool participation. The NECA voluntary pools do include larger telephone companies, and are open to all companies. The pools taken as a whole also are the equivalent of a substantial company. Rate regulation of the voluntary pool tariffs in basically the same manner as a single large access provider thus seems generally appropriate. However, it should be possible for NECA to revise and update its rates for Docket 84-800 off-years without the need to collect data from all the pool members, including the small telephone companies. Statistical projections based upon pool results and any relevant regulatory changes should provide a basis for updating rates which is as accurate as the more burdensome procedures of performing full past and future cost and demand studies. It also maintains the principle of pooling neutrality by offering the same benefits to those companies inside the pool as to those outside.

37. Finally, we believe that, as some commenters have urged.[20] we can establish the threshold for treatment as a small company at a higher level than the 20,000 lines proposed by USTA. A threshold of 50,000 lines would conform the definition in this area with the existing 50,000 line threshold used for determining eligibility for the small company contributions from the Universal Service Fund.[21] It would also reduce the burdens of additional companies, while not increasing in any substantial way the possible inaccuracies of overall industry rates. According to USTA's petition, there are 1106 companies with fewer than 20,000 access lines, constituting 2.7 percent of the interstate access market.[22] A 50,000 line threshold would increase this to 1128 companies and 3.2 percent of the market.[23]

**D. Incentives for Efficiency**

38. In addition to these specific proposals, we also invite comment on methods by which the approaches proposed here, or other approaches to reducing small company burdens, may also provide reasonable incentives and rewards for companies which improve their efficiency in providing access, to the benefit of interexchange carriers, customers, and the national economy.

**E. Application of Proposals to Large Companies**

39. A number of commenters have proposed that we also reduce regulatory burdens upon large telephone companies.[24] While we agree that this is a desirable goal, and one which we are pursuing in other proceedings,[25] it also is one which raises different issues than those presented by USTA. The major local telephone companies provide the overwhelming proportion of access services, and the success of the overall access plan depends on the fact that those companies' rates accurately reflect current costs and demand. Inaccurate rates by the large companies would distort the overall industry rates for access, and, consequently, the long distance rates charged to customers. These companies also have sufficient administrative resources that the present tariff filing requirements are not proportionately so burdensome. We believe that beginning the reduction of regulatory burdens with small companies is appropriate and should not be delayed by the more complex issues presented by the tariffs and rates of the major companies. Of course, experience gained with respect to the small companies may well prove applicable to larger companies.

**F. Other Issues**

40. USTA also presents two other proposals: (1) that small telephone companies (defined as companies serving 20,000 or fewer access lines)[26] be found to be non-dominant carriers subject to the same regulations as other carriers found to be non-dominant; and (2) that this Commission examine the impact of its proposed rules in pending and future rulemakings in order to minimize burdens on small telephone companies.

1. Dominant/Non-Dominant Status of Small Telephone Companies

41. The major premise of USTA's request that small telephone companies be accorded non-dominant status is that those companies "do not exercise sufficient market power in the relevant interstate market to charge excessive rates or impose conditions of service that could contravene the Communications Act . or the opportunity or incentive to subsidize competitive service offerings with their small local rate base." USTA Petition at 11-12. USTA contends that despite the fact that each of these companies, in common with large telephone companies, operates as the sole provider of local telephone service in its exchange area, outside competitive factors prevent these small companies from exercising significant market power.

42. USTA cites three such outside competitive factors which it claims prevent excessive rates by small companies. First, it argues that small company rates are constrained by the rates charged by the larger companies. Small companies are said to have a strong disincentive to set exceedingly high access rates because such action would result in increased pressure to deaverage toll rates, and deveraged toll rates could well discourage calling to rural areas, thus reducing access usage of a small telephone company.

43. This argument seems highly speculative, however, and the possibility that a small telephone company would experience any significant incentive to restrain its profits in order to match another telephone company's access rates seems remote. USTA cites no examples of such price restraint, and it is difficult to credit the argument that any single small telephone company would believe that its excessive rates would cause a change in the pricing strat-

egies of AT&T and other long distance carriers that maintain basically averaged toll rates. While some level of excessive price might produce a response by way of deaveraged rates, any small telephone company could logically assume that it would be free to increase its rates at least to the level of the highest access rates without constraint.

44. Moreover, an unspoken premise of this argument seems to be that small telephone companies have higher costs than large companies. In fact, many small telephone companies have relatively low costs and thus would have a high margin by which they could raise prices to the hypothetical industry ceiling.[27] A knowledgeable small company rate setter would also discount the likelihood of deaveraged long distance rates in view of the political sensitivity of any such proposal and the administrative convenience that averaging provides for long distance carriers. He would also assume that any short-term excess profits would not prevent reducing rates at a later date if deaveraged rates were proposed in practice.

45. Second, USTA contends that access rates set too high would stimulate bypass, leading possibly to the loss of important large customers. While it is possible that bypass might impose some price restraint, we are again presented with no evidence that all or most small company rates are constrained by bypass and it is unlikely that bypass prevents excessive rates at the present time. Most access charges are paid by long distance carriers. So long as nationally averaged rates are charged by long distance carriers, excessive local rates are irrelevant to the long distance companies' local customers. The largest component of switched access rates, the CCL rate element, is nationally averaged and would not be affected by excessive local rates. Even if a large customer did consider moving to a bypass system, the incentives for a small company are likely to be the subsidization of special access rates in order to keep the customer, and the imposition of switched access rate increases which would be paid by the long distance carriers and, ultimately, all customers for long distance service. It is also, of course, not clear that any price restraint caused by the threat of bypass would not occur at an excessive price. Finally, the small telephone company rate setter might well be able to charge excessive rates for some indefinite short term and reduce them only to respond to an actual bypass threat. For a great many small telephone companies this threat is probably far more distant than for larger companies with higher concentrations of business service.

46. Third, USTA contends that small companies are unable to cross-subsidize other services from their regulated base because of significant and increasing pressure from state commissions struggling to keep local rates down. To the extent that this argument is valid,[28] it would seem to weigh against USTA's proposal. If a state commission puts pressure on a small company to keep local exchange and intrastate toll rates low, but this Commission has reduced its pressure on interstate rates, the small company would have a natural incentive to increase interstate access rates which are indirectly paid by all long distance customers, and thus subsidize its local rates at the expense of long distance customers nationwide.

47. USTA also presents a general argument, especially in its reply, that although all small telephone companies operate as local monopoly providers of basic exchange service, this market power at the local level does not necessarily translate into market power at the interstate level. It cites the fact that carriers with 20,000 or fewer access lines represent only 2.7 percent of the interstate access market, and argues that smaller carriers lack the market power to manipulate any part of the interstate access market. It also argues that large nationwide telecommunications companies can effectively use competitive local technologies such as cellular telephone, CATV, and direct interexchange connection to erase any market power advantages. The size of interexchange carriers such as AT&T is also said to give them the ability to obtain redress through a regulatory process such as a complaint proceeding.

48. Essentially, USTA appears to be arguing here that the size of small telephone companies renders them unable to set excessive rates for much larger private customers and interstate carriers. However, there is no current evidence for this and, as many of the comments observe, it appears to be the case that all local telephone companies retain market power by virtue of their monopolies over the provision of local telephone service. Even if bypass is feasible for originating calls, for example, any long distance carrier or private customer desiring to provide service to all points must obtain access from the local telephone company to terminate calls to customers in the exchange area. Bypass is also a realistic possibility only for relatively large users; ordinary subscribers must rely on the public switched network for long distance service, and long distance carriers, regardless of their size, must rely on obtaining originating access from local exchange carriers to provide this service. State regulatory requirements in many cases also erect barriers to competition by way of bypass. No evidence is presented which indicates that alternative means of communication present any significant present competition to small telephone companies, or any such imminent potential competition that these companies are restrained from setting their TS access rates at excessive levels.

49. In general, and for the foreseeable future, small telephone companies will continue to control bottleneck facilities for use of the public network, even though, one might say, the bottles themselves are small. They also retain the ability and the incentive to charge excessive rates because of this market power. Because the access these carriers provide is a small percentage of the industry total, the overall effect on long distance rates would be small, but it would be real and immediate. Long distance customers would pay unduly high rates and efficient use of the switched network would be discouraged. So, too, would entry by competing long distance carriers to serve small telephone company subscribers.

50. For these reasons, we find no present reason to modify the conclusion in the *Competitive Carrier Investigation*, CC Docket No. 79-252, (*First Report and Order*), 85 FCC 2d 1, 24 (1980) that all local telephone companies have market power and should be regulated as dominant carriers. As we stated there, we are "receptive to the presentation of evidence that circumstances have evolved in a manner which permits the easing of the regulatory requirements to which any carrier or class or carriers is subject." *Id.* at 11. In the future, actual competition may develop which would warrant this conclusion for local telephone companies, large or small. The present record, however, provides no evidence of this.

51. The reduced regulatory requirements for nondominant carriers specifically reflect the fact that such carriers have been found to lack the market power that

would allow them to set and maintain excessive rates. Marketplace forces are expected to discipline prices, justifying a presumption that rates as filed are reasonable. Non-dominant carrier rates are thus considered *prima facie* lawful, *see* 47 C.F.R. § 1.773(a)(1)(ii), and are not required to provide the cost support material necessary to evaluate proposed rate increases absent a specific Commission request, 47 C.F.R. § 61.38(a). For carriers with market power, such as local exchange telephone companies, no such presumption is justified in the absence of adequate cost support material. Because both large and small exchange telephone companies have the ability and incentive to file excessive access rates, the specific forms of relaxed regulation for non-dominant carriers that lack this ability are not suitable.[29]

2. Consideration of the Impact of Proposed Rules Upon Small Telephone Companies in Pending and Future Proceedings

52. USTA also requests that this Commission examine the the impact of all proposed rules on small telephone companies. It is, of course, this Commission's intent to consider the burdens and benefits of its proposed rules as they affect all interested parties, and to consider reducing regulatory burdens where possible, consistent with the public interest and the Communications Act. The rules proposed in this Notice demonstrate this commitment on behalf of small telephone companies.

## V. COMMENTS; PROCEDURAL RULES

53. This notice of proposed rulemaking is being issued to determine whether it would be in the public interest to reduce the administrative and regulatory burdens on small telephone companies. We expect to develop in this notice and comment rulemaking all the relevant, material and probative data and information needed to make the public interest determination.

54. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on this Commission's Open Meeting Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this Commission and a Commissioner or a member of this Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on this Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

55. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments in this proceeding on or before January 26, 1987 and reply comments on or before February 25, 1987. All relevant and timely comments will be considered by this Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

56. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments an original and 11 copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at its headquarters at 1919 M St., N.W., Washington, D.C.

57. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

58. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b) does not apply to this rulemaking proceeding because if promulgated, it would not have a significant economic impact on a substantial number of small entities. The definition of a "small entity" in Section 3 of the Small Business Act excludes any business that is dominant in its field of operation. Although some of the local exchange carriers that will be affected are very small, local exchange companies do not qualify as small entities because they have a nationwide monopoly on ubiquitious access to the subscribers in their service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 2d 1, 23-24 (1980). To the extent that small telephone companies will be affected by these rules, we hereby certify that these rules will not have a significant economic effect on a substantial number of "small entities." Although we do not find that the Regulatory Flexibility Act is applicable to this proceeding, this Commission has an ongoing concern with the effect of its rules and regulations on small business and the customers of the regulated carriers as is evidenced by this proceeding.

## VI. ORDERING CLAUSE

59. Accordingly, IT IS ORDERED, That a rulemaking proceeding IS INSTITUTED to determine whether it would be in the public interest to reduce the administrative and regulatory burdens on small telephone companies and amend this Commission's Rules as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**Appendix A**

The following parties filed Comments to the USTA Petition:

American Telephone and Telegraph Company
American Information Technologies
Bell Atlantic Telephone Companies
BellSouth Corporation
People of the State of California and the Public Utilities Commission of the State of California
CP National Corporation
C-R Telephone Company
Crossville Telephone Company
Depue Telephone Company
Fidelity Telephone Company
Great Plains Communications
GTE Telephone Companies
Gulf Telephone Company
Home Telephone Company
Huntel Systems, Inc.
Iowa Telephone Association
K & M Telephone Company
Leaf River Telephone Company
MCI Telecommunications Corporation
Metamore Telephone Company
Moultrie Independent Telephone Company
Mountain States Telephone and Telegraph Company, Northwestern Bell
Telephone Company and Pacific Northwest Bell Telephone Company
National Association of Regulatory Utility Commissioners
National Telecommunications and Information Administration
National Telephone Cooperative Association and National Rural Telecom Association
New York State Telephone Association
New York Telephone Company and New England Telephone and Telegraph Company
State of New York Department of Public Service
New Windsor Telephone Company
Ohio Telephone Association
Oregon Independent Telephone Association
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Bell Telephone Company
Phillips County Telephone Company
Southwestern Bell Telephone Company
Strasburg Telephone Company
Taconic Telephone Corp., Elkhart Telephone Company, Dobson and McLoud
Telephone Companies, and Merrimack County Telephone Company
Telephone and Data Systems, Inc.
Telephone Association of Maine
Telephone Electronics Corporation
Texas Telephone Association
United Telecommunications, Inc.
Washington Independent Telephone Association
West River Mutual Aid Telephone Corporation

Reply Comments were filed by the following parties:

BellSouth Corporation
East Ascension Telephone Company
MCI Telecommunications Corporation
National Rural Telecom Association
Tele-Communications Association
Telephone Electronics Corporation
United States Telephone Association
Wisconsin State Telephone Association

**Appendix B**

**COMMENTS OF THE PARTIES**

1. All of the commenters, with the exception of MCI Telecommunications, Inc.,[30] agree with USTA that the regulatory burdens on the small telephone companies should be reduced. While many of the parties give blanket approval of the USTA Petition as it was filed, most indicate varying changes that they wish the Commission to consider.

**A. Reduce Regulation to All Telephone Companies**

2. American Information Technologies (Ameritech), Bell Atlantic, BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) and United Telephone System, Inc. (UTS) suggest that the Commission also address the need to reduce the regulatory and administrative burdens of all local exchange telephone companies. Ameritech asserts that where deregulation and streamlined regulation can be demonstrated to be in the public interest, the size of the telecommunications provider should not arbitrarily forclose steps toward deregulation. Bell Atlantic similarly asserts that regulatory burdens should be streamlined whenever feasible, whether or not carrier is non-dominant under the Commission's Rules BellSouth, NYNEX and UTS believe that the Commission should implement reduced regulatory requirements for the LECs with 20,000 or less access lines and later consider the development of a plan to reduce regulation for all LECs.

**B. Reclassification as Non-Dominant**

3. A number of commenters who support the USTA Petition with regard to reducing regulation of the small telephone companies, do not agree that the companies need to be classified as non-dominant. For example, CP National Corporation (CP National) believes that the Commission has the authority to reduce regulatory burdens without addressing the "dominant carrier" question. MCI and Southwestern Bell Telephone Company (Southwestern Bell) do not find that a reclassification is necessary to provide relief from specific regulatory requirements when it can be demonstrated that such relief is consistent with the public interest. MCI also believes that the independent telephone companies, regardless of size, are dominant carriers because they control access to facilities essential to the provision of other communications services.[31] Finally, Pacific Bell (Pacific) asserts that the issues defining markets and which carriers are dominant and non-dominant within the markets are much broader than the scope of the USTA Petition.

4. American Telephone and Telegraph Company (AT&T), Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West), and the National Telecommunications and Information Administration (NTIA) do not believe that this Commission should reclassify the small telephone carriers as non-dominant but should instead base any decision to reduce regulation on the fact that the cost of applying the present regulatory rules outweigh the benefits of such regulation.

**C. Definition of Small Telephone Companies**

5. Some of the commenters urge the Commission to alter the definition of a small telephone company to provide that a carrier providing service to 50,000 or fewer access lines shall be considered a small company. While those commenters are not in complete agreement as to whether the 50,000 line margin should apply to study areas or operating companies, they agree that regulatory relief is needed for the smaller carriers. The National Telephone Cooperative Association (NTCA) and the National Rural Telecom Association (NRTA) assert that expanding the definition of small telephone companies from 20,000 loops to 50,000 loops and focusing on "study area" as opposed to "company" would have little effect in terms of adding a significant number of access lines to the category affected by relaxed regulation,[32] and would be consistent with the definition used in providing high cost assistance to small telephone companies.[33]

6. Telephone and Data Systems, Inc. (TDS) similarly contends that when this Commission chose study areas with less than 50,000 access lines it was aware that smaller telephone companies need more high cost assistance than large companies and that the same logic is applicable to the agenda proposed by USTA.[34] TDS also indicates that this Commission based the allocation of local commercial costs to Account 645 under Part 67 of the Rules and the allocation of interstate costs in Account 645 under Part 69 of the Rules on the 50,000 loop study area standard.[35] TDS argues that the Commission's consistent use of the 50,000 line study areas as the cut off between small and large telephone companies should likewise be used in the deregulatory proceeding proposed by USTA.

7. Telephone Electronics Corporation (TEC) asserts that the access line threshhold that entitles a small independent telephone company to the proposed reduced regulation should be calculated for each operating company rather than at the holding company level.

**FOOTNOTES**

[1] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, released Sept. 30, 1985 (Docket 84-800).

[2] USTA Petition at 3.

[3] *See* Fowler, Halprin & Schlichting, " *Back to the Future* ": *A Model for Telecommunications*, 38 Fed. Com. L.J. 145, at 157 n.37 (1986).

[4] Public Notice, Mimeo No. 2881, released Feb. 27, 1986.

[5] A list of the commenting parties is included as Appendix A to this Notice. A more detailed summary of the comments is contained in Appendix B.

[6] For a discussion of the importance of universal service as telecommunications policy, see Fowler, Halprin & Schlichting, " *Back to the Future* ": *A Model for Telecommunications*, 38 Fed. Com. L.J. 145, 148 & n.2 (1986).

[7] In fact, because the current Part 69 Rules allocate all of NECA's administrative costs to the CL pool, the voluntary pools used primarily by small telephone companies are not presently assessed any of the administrative costs which small companies would necessarily incur in preparing their own rates and tariffs.

[8] The present Part 69 rules do not, however, permit average schedule copmpanies to file individual tariffs. These companies, generally small, have chosen not to perform cost studies, but rather to settle on the basis of a set of nationwide interstate formulas based on average costs. These formulas are regularly filed and updated by NECA on behalf of the average schedule companies, and these companies are required to participate in the NECA EUCL and TS pools. There are currently 709 average schedule companies. If these companies elect to become cost companies they can, of course, also elect to file their own tariffs.

[9] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, (1986), *recon. denied*, FCC 86-472, released Nov. 6, 1986.

[10] NECA also has maintained a voluntary billing and collection pool and corresponding tariff provisions. This arrangement will end with the detariffing of billing and collection, although NECA has been negotiating contracts with interexchange carriers on behalf of small companies which should maintain the advantages of nationwide pooling.

[11] Amendment of Annual Report Form M and FCC Report 901, CC Docket No. 85-308, FCC 86-97, released Mar. 20, 1986.

[12] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on October 3, 1986, Mimeo No. 6356, released Aug. 15, 1986.

[13] *See* para. 16, *supra*.

[14] It might also be argued that we should take into account the overall effects of proposals intended to allow more individual small telephone company tariffs upon the total industry costs of providing access. Eliminating access tariff filing requirements for some carriers would increase total access costs by a small but real amount (because of the lost efficiencies associated with the centralized NECA tariff filings), and these cost increases would paid on first by long distance carriers and

then by local subscribers in the form of higher long distance rates. Because small telephone companies will ordinarily lack the expertise to file their own interstate tariffs, the result is likely to be that these higher rates will be used (at least in part) to pay fees to third parties hired by the small telephone companies to prepare the tariffs, rather than providing any public benefits. However, it would clearly be difficult for this Commission to weigh these costs against the benefits to a small company of filing its own interstate access tariff; we believe that judgment should be left to small and large telephone companies alike. As we discuss later in this Notice, we also believe that there are methods available to minimize these costs.

[15] AT&T Comments at 7.

[16] USTA Reply Comments at 12.

[17] USTA does not explain its calculation of the $9 million figure and no other commenter has had an opportunity to verify or challenge it, because the reply was the last round of the comment cycle.

[18] At present, average schedule companies participate in all the NECA pools. Although we have included average schedule companies in our proposal, it may not prove feasible for average schedule companies to file rates which copy the average schedule settlements. There may be also little need or desire for such an option, and drawbacks such as increased administrative burdens. Commenters are invited to address these issues in the forthcoming comment cycle.

[19] This proposal is independent of the proposed reduced filing requirements for small companies using historical costs and demand discussed above. Small companies would be allowed to file rates in alternate years to be effective for a two-year period, regardless of which rate-making method they elect. Small companies electing to use historical costs would not, under the approach proposed above, be subject to automatic refund liabilities, and thus a longer interval between filings might be considered. However, a two-year filing period appears to strike a proper balance between regulatory obligations and the likelihood that rates will become unreasonable. Use of a consistent filing schedule also simplifies the process, especially for carriers wishing to change their filing status.

[20] *See, e. g.*, Comments of NRTA, NTCA, and TDS.

[21] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Decision and Order, 50 Fed. Reg. 939 (Jan. 8, 1985).

[22] USTA Petition at ii, 23.

[23] We would apply this threshold at the study area level, rather than at the narrower exchange level or the wider holding company level. This is consistent with the definition in the Separations Manual for purposes of the Universal Service Fund. *See* Section 65.611 of the Commission's Rules, 47 C.F.R. § 65.611.

[24] *See* Comments of Ameritech, Bell Atlantic, BellSouth, NYNEX and UTS.

[25] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry* ) Notice of Proposed Rulemaking, 50 Fed. Reg. 33,581 (1985) and Report and Order, FCC 86-252, Mimeo No. 36693, released June 16, 1986. *See also* Fowler, Halprin & Schlichting, *Back to the Future*, discussion on Open Network Architecture at 188-193.

[26] USTA suggests that this threshold might in time be raised to 50,000 lines. We are proposing in this Notice that the threshold be 50,000 lines. *See* para. 7, *supra*.

[27] *See* NECA Submission of 1986 Study Results, CC Docket No. 80-286, Universal Service Fund, Sept. 2, 1986.

[28] In fact, as USTA observes in another context, some state commissions are reducing regulation for small independent telephone comapnies. *See* USTA Petition at fn.10. The nature of state commission regulation plainly varies from state to state.

[29] For example, the test for rebutting the presumption of *prima facie* lawfulness of tariffs filed by non-dominant carriers, which USTA proposes be applied to small companies, is not relevant. This test requires a showing "that the harm alleged to competition would be more substantial than the injury to [the] public " 47 C.F.R. § 1.773(a)(1)(ii)(B). Even extremely high rates would not harm competition in the usual case of a small telephone company which is not subject to any competition. Harm to competition is generally expected only from predatorily low or discriminatory rates, or other anticompetitive practices.

[30] MCI's primary argument was that the Commission should not reclassify small independent telephone companies from dominant to non-dominant status. This argument is not inconsistent with that of many of the commenters.

[31] MCI Comments at 3.

[32] Comments of NTCA and NRTA at 4. NTCA and NRTA suggest that this change would only result in increasing the total interstate access lines in service affected by the reduced regulations to 4.5 percent.

[33] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Decision and Order, 50 Fed. Reg. 939 (Jan. 8, 1985).

[34] TDS Comments at 7.

[35] TDS Comments at 7. *See* MTS and WATS Market Structure, Decision and Order, 51 Fed. Reg. 317o (Jan. 24, 1986); MTS and WATS Market Structure, Decision and Order, 51 Fed. Reg. 11035 (Apr. 1, 1986).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| MTS and WATS Market Structure | CC Docket No. 78-72 |
| Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board | CC Docket No. 80-286 |

**MEMORANDUM OPINION AND ORDER ON RECONSIDERATION**

**Adopted: December 8, 1986 Released: December 18, 1986**

By the Commission: Commissioner Dennis not participating.

## I. INTRODUCTION

1. Seven entities have filed petitions seeking reconsideration or waiver[1] of our *Decision and Order* released January 7, 1986[2] concerning the separations treatment established for Account 645, Local Commercial Operations.[3] In the *Decision and Order*, we adopted the Federal-State Joint Board's recommendations,[4] with a few minor modifications.[5] Those recommendations were based upon the conclusion that, whenever administratively feasible, the costs in Account 645 should be allocated for separations purposes on a work function analysis to ensure that the resulting jurisdictional allocation reflects principles of cost causation. We also agreed with the Joint Board's conclusion that we should distinguish between large and small local exchange carriers for purposes of implementing the new allocation procedures. These changes became effective June 1, 1986 for larger companies and will become effective January 1, 1987 in study areas with fewer than 50,000 access lines.

2. This *Order* addresses the issues raised by the petitioners and concludes that the issues are either moot or without merit and should be rejected. We therefore deny the petitions for reconsideration and dismiss the waiver requests as moot.

## II. BACKGROUND

3. In November 1984 the New York Public Service Commission (New York) filed a petition for rulemaking in which it stated that under the separations rules then in effect, AT&T's assumption of billing inquiry services previously provided by the local exchange carriers (LECs) would cause an unanticipated shift of local commercial operations costs (Account 645) to the intrastate jurisdiction.[6] The New York petition stated that AT&T planned to discontinue use of the billing inquiry service offered by New York Telephone Company on January 1, 1985.[7] To prevent a sudden and substantial reassignment of costs to the state jurisdiction, New York requested that this Commission freeze the customer contact factor[8] used in allocating the costs in Account 645 until we could permanently amend our rules governing the separation of these costs. The potential effect of AT&T's decision to discontinue use of Bell Operating Company (BOC) billing inquiry services stemmed from the fact that the Part 67 procedures for the categorization and allocation of Account 645 costs did not reflect the actual costs of performing the various local commercial office functions. Under these procedures, the level of Account 645 costs assigned to the interstate jurisdiction was largely a product of the customer contact factor,[9] although responding to end user billing inquiries involves a very small portion of local commercial office work time. Thus, AT&T's provision of its own billing inquiry service would reduce the number of local commercial office contacts related to interstate toll messages, thereby lowering the interstate cost assignment, without producing an offsetting reduction in total local commercial office costs.[10] The jurisdictional shift was far in excess of the costs that LECs would save by discontinuing their billing inquiry service and underscored the jurisdictional misallocation of costs that had been produced by the then existing separations procedures. This Commission referred the New York petition to the CC Docket 80-286 Federal-State Joint Board for a recommendation.

4. The Joint Board acknowledged that excessive Account 645 costs had been allocated to the interstate jurisdiction, but in light of the potentially abrupt jurisdictional shift, recommended that, as an interim measure, the interstate allocation of Account 645 costs be frozen and then phased down over a twelve month period to approximately one-half of the pre-existing level.[11] The Joint Board also sought comments and data on the impact of two alternate long term plans – referred to as Plan and Plan B – containing new separations procedures for. Recommended *Decision and Order*, the Joint Board recommended new provisions for Account 645 based upon Plan B with certain modifications. The *Decision and Order* adopted the recommendation of the Joint Board with minor modifications.[12]

## II. THE PETITIONS AND THE RESPONSES

5. Petitions and responsive pleadings were filed by several parties[13] and are summarized below.

### A. Southwestern Bell

6. In general, Southwestern Bell supports the revised procedures. However, Southwestern Bell argues that the procedures for interexchange carrier service (IEC) functions consisting of three main categories and eighteen subcategories, and the attendant need for work function analysis, is overly complex and should be simplified, particularly in light of its estimate that the IEC functions account for less than 10 percent of total Account 645 costs. Southwestern contends that the precision gained by establishing the new categories and subcategories is more than offset by the cost of establishing them and performing the required analysis. Thus, Southwestern suggests that a single IEC category ("IEC Access Services") be established to be segregated between private line and message toll on the basis of revenues and separated on the same basis.

7. Southwestern Bell also seeks reconsideration in this *Order* of our decision in the *Detariffing Order* [14] to calculate the cost of any deregulated billing and collection in

compliance with Parts 67 and 69 of our Rules. According to Southwestern Bell, the use of these traditional separation/access procedures overstates the cost of providing the deregulated service. For instance, Southwestern contends that indirect costs such as general overhead expenses, taxes and general investment enter the separations process and are allocated to various Part 67 categories and to various Part 69 rate elements, including billing and collection, by essentially arbitrary procedures. It also contends that those costs which are recovered by the billing and collection rate element are totally unrelated to the cost of providing billing and collection. Finally, it argues that though this may be appropriate for jurisdictional separations, it simply is not designed to determine the cost of a service.

8. As an alternative, Southwestern Bell reiterates its initial proposal,[15] urging the use of an analytical study of work functions to determine the direct and indirect costs of providing billing and collection. These discrete costs would then be placed in an access billing and collection category and separated along with other direct and indirect costs from other accounts. This approach differs from the Part 69 procedures which allocate the interstate portion of general expenses and other taxes to the interexchange category and to the various access elements through use of the Big Four Wage Factor.[16]

9. AT&T, in its opposition to the petitions for reconsideration, argues that Southwestern Bell is the only carrier raising the administrative burden issue. AT&T observes that this Commission's *Decision and Order* is supported by the vast majority of commenters in the proceeding.

**B. Pacific Bell**

10. Pacific Bell opposes our requirement that the LECs identify billing inquiry contacts to segregate end-user billing inquiry expenses and interexchange billing inquiry expenses into subcategories. It believes, based on its experience, that to develop such contacts, LECs will have to conduct worktime studies in the billing inquiry offices and that the amount of interstate expense identified by these studies would be insignificant. Pacific Bell states that it has no interstate message toll end user inquiries and that the AT&T inquiry take-back will soon involve all LECs. Subsequently, Pacific Bell argues, only a few LECs that provide corridor service will incur any interstate message inquiry expense. Pacific Bell further argues that interstate private line end user inquiries constitute a very small portion of total inquiries and, thus, of interstate expenses, and that billing inquiry contacts for interstate subscriber line charges are also small and are decreasing.

11. As an alternative, Pacific Bell proposes revenue subject to inquiry as a reasonable allocator for end user billing inquiry and interexchange carrier billing inquiry. According to Pacific Bell, a revenue allocator would differentiate between interstate and intrastate usage and would thereby reflect through larger allocations, customer tendencies to inquire when larger amounts are in question and when rates change. While Pacific Bell provides no accounting data in support of its suggestion, it states that the data required to make the proposed allocations are readily available.

12. Pacific Bell also contends that the procedures requiring the identification of actual service order contacts to segregate end user and carrier service order processing into subcategories do not strike a fair balance between accurate state and interstate cost identification and the administrative burdens involved in making that identification. While Pacific indicates that its service order contacts may be developed without incurring significant administrative expenses, it urges us to be sensitive to the potential burdens these service order procedures may place on other LECs.

13. AT&T argues in opposition that this Commission and the Joint Board have already balanced the need to produce cost-based separations against the administrative burden involved, and that no further reconsideration is necessary.

14. Pacific Bell replies to AT&T's opposition by stating that some of the new procedures adopted by this Commission are too complex and costly in relation to the benefits gained by the technical specificity and accuracy in the new rules. Pacific Bell urges us to consider adopting simplification measures in accordance with the efforts of the United States Telephone Association's Separations Reform Task Force and AT&T.[17] Pacific Bell contends that its petition is a reflection of legitimate concern shared by other members of the industry to simplify separations procedures.

**C. National Telephone Cooperative Association**

15. NTCA believes it is improper to allocate 100 percent of the local service order processing function costs to intrastate. In the *Decision and Order*, local service order processing, a subcategory of the end user service order processing category, is charged 100 percent to intrastate. NTCA argues that subscribers first must obtain local service to obtain interstate or intrastate toll service. Therefore, NTCA argues, the service order processing functions of creating and retaining customer records must be performed regardless of the type of services the customer orders. Thus, NTCA concludes that the allocation of 100 percent of these costs to intrastate is improper and that the recognition of actual uses of joint property is essential to the appropriate recognition of the competent government authority. NTCA argues, therefore, that this Commission should reconsider its decision to allocate 100 percent of the local service order processing subcategory to the intrastate jurisdiction.

16. NATA also suggests that local service order processing costs be partially allocated to the interstate jurisdiction because they do benefit interstate toll services. AT&T responds that NATA's arguments have already been considered by this Commission and the Joint Board and should be ignored.

**D. Bell Atlantic**

17. Bell Atlantic seeks reconsideration of the effective date of the separations changes. It proposes that the date be changed from June 1, 1986 to January 1, 1987. It states that LECs cannot practically implement the proposed Part 69 changes by June 1, 1986.

**E. United Telephone Systems, Inc.**

18. UTS supports the new permanent separations procedures. It requests, however, that the effective date be deferred until January 1, 1987. UTS notes that this Commission has established January 1, 1987 as the effective date for small companies with 50,000 loops or less and argues that it should be accorded the same treatment.

19. UTS argues that more time is needed to proceed with the studies required for implementation of the proposed revisions. It argues that while AT&T has already begun to assume billing responsibility for its customers from the BOCs, UTS is still providing that service for AT&T and will do so through June 1987. Thus, while the BOCs have had the opportunity to plan for intrastate rate relief, UTS has not. It argues that while the instant *Order* was the first sufficiently definite predicate for seeking relief, it needs more time to reasonably quantify, for intrastate rate case purposes, the amount of intrastate rate relief that will be required with new allocation procedures. UTS argues that its companies would have less than one month of study data upon which to base the projection for the seven-month period June 1, 1986 to December 31, 1986. Further, UTS argues that its companies lack the necessary historical data to incorporate any seasonal variations.

**F. AT&T: Opposition to Petition For Reconsideration**

20. In addition to addressing arguments presented by specific parties, AT&T argues that reconsideration should not be granted merely to permit parties who oppose the *Decision and Order* an opportunity to reargue claims regarding the allocation of certain local commercial office costs or implementation of the new separation rules already presented to this Commission. It observes that we have already addressed the detariffing of billing and collection in CC Docket No. 85-88.[18] In conclusion, AT&T states that the petitions for reconsideration either raise issues that are being considered in other proceedings or simply reargue contentions already made and properly rejected in this proceeding.

**G. Continental Telecom, Inc.**

21. In its petition for waiver, Continental Telecom, Inc. requests that the effective date be postponed from June 1, 1986 to January 1, 1987 because of the administrative difficulties and potential financial burdens.

**H. National Exchange Carriers Association**

22. NECA also requests that the effective date be postponed from June 1, 1986 to January 1, 1987 because of severe administrative burdens and financial risks for the exchange carriers with study areas in the NECA traffic sensitive pool.

## III. DISCUSSION

**A. Effective Date**

23. On March 21, 1986, this Commission released a *Report and Order* [19] in which we considered the Part 69 recovery of Account 645 costs. Therein, we denied the requests for reconsideration or waiver of the new separations procedures to the extent that they sought modification of the June 1, 1986 effective date for the separations changes as applied to the larger companies or waiver or deferral of the effective date of the corresponding Part 69 changes adopted therein.[20] The instant requests of Bell Atlantic, UTS, Continental Telecom Inc. and NECA merely repeat the previous requests for deferral of the effective date and are therefore dismissed as moot.

**B. Changes in Separations Procedures**

24. As indicated above, several petitioners have raised questions regarding the separations procedures. Some allege that the administrative burden associated with the number of categories and subcategories we required for IEC costs is excessive. We have reviewed the contentions of both Southwestern Bell and Pacific Bell that the burden is excessive, including Southwestern's claim that IEC costs represent less than 10 percent of total Account 645 costs. However, neither Southwestern Bell nor Pacific Bell provided any information relative to the revenue requirement impact associated with our approach. In the *Decision and Order*, we were careful to balance the need for IEC categories and subcategories comparable to those for end-users against the burden involved. We still believe that comparability is important and our initial approach is correct. Thus, we are still requiring the IEC categories and subcategories established in the *Decision and Order*. We have not been persuaded that any of the suggested alternatives would be preferable and will accordingly deny those petitions. We will, however, continue to study separations simplification generally and may modify these rules in the future.

25. Southwestern Bell's arguments relating to the allocation of costs between interstate billing and collection and interstate access elements have been presented in the wrong proceeding and, accordingly, will not be addressed in this order. We note that this very question is being addressed in Docket 86-111, Separation of Costs of Regulated Telephone Service, FCC 86-146 (adopted April 3, 1986), 51 Fed. Reg. 16178 (May 1, 1986), paras. 101-103.

26. We also reject NTCA's argument that the allocation of 100 percent of the local service order processing function costs to intrastate is improper. This Commission and the Joint Board have already considered and dismissed these arguments in the *Decision and Order*, para. 13, generally concluding that those parties seeking an interstate allocation had not identified any common or joint costs that were material. NTCA has not raised any new arguments or presented any additional data to support its argument.

## IV. CONCLUSION

27. For the reasons set forth above, we dismiss the requests for deferral of the effective date. Futher, we conclude, based on the record, that the separations treatment prescribed in our original *Decision and Order* should not be modified at this time.

## V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, That the petitions for reconsideration of our January 7, 1986 *Decision and Order* ARE DENIED.

29. IT IS FURTHER ORDERED that the requests for waiver of the amendments to Part 67 of the Commission's rules set forth in Appendix A of the *Decision and Order* ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

## APPENDIX A

Joint Board's Recommendation:

Category 4: Interexchange (IEC) carrier service Subcategories:

**1. IEC service order processing**

Sub-sub: State special access and private line

Sub-sub: Interstate special access and private line

Sub-sub: State switched access and message toll including WATS

Sub-sub: Interstate switched access and message toll including WATS

**2. IEC payment and collection**

Sub-sub: State special access and private line

Sub-sub: Interstate special access and private line

Sub-sub: State switched access and message toll including WATS

Sub-sub: Interstate switched access and message toll including WATS

**3. IEC billing and inquiry**

Sub-sub: State special access and private line

Sub-sub: Interstate special access and private line

Sub-sub: State switched access and message toll including WATS

Sub-sub: Interstate switched access and message toll including WATS

Joint Board's Recommendation as Modified by the Commission :

Category 4: Interexchange carrier service order processing Subcategories:

1. State special access and private line
2. Interstate special access and private line
3. State switched access and message toll including WATS
4. Interstate switched access and message toll including WATS
5. State billing and collection
6. Interstate billing and collection

Category 5: Interexchange carrier payment and collection Subcategories:

1. State special access and private line
2. Interstate special access and private line
3. State switched access and message toll including WATS
4. Interstate switched access and message toll including WATS
5. State billing and collection
6. Interstate billing and collection

Category 6: Interexchange carrier billing inquiry Subcategories:

1. State special access and private line
2. Interstate special access and private line
3. State switched access and message toll including WATS
4. Interstate switched access and message toll including WATS
5. State billing and collection
6. Interstate billing and collection

## FOOTNOTES

[1] Petitions for Reconsideration were filed by Southwestern Bell Telephone Company (Southwestern Bell), Pacific Bell, the National Telephone Cooperative Association (NTCA), the Bell Atlantic Telephone Companies (The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company), and United Telephone System, Inc. (UTS). Petitions for waiver were filed by Continental Telecom Inc. (Contel), and the National Exchange Carriers Association, Inc. (NECA). UTS requested that its petition for reconsideration be considered a petition for waiver as an alternative to reconsideration, if appropriate. American Telephone and Telegraph Company (AT&T) filed comments in opposition to the petitions filed. Pacific Bell filed a response to AT&T's opposition.

[2] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-5 (released January 7, 1986), 51 Fed. Reg. 3,176 (January 24, 1986)(*Decision and Order* ).

[3] Account 645 consists of expenses related to telephone company local commercial operations, excluding promotional and directory services. Telephone company commercial office personnel perform service order processing, billing inquiry, and certain billing and collection functions for end users and interexchange carriers, as well as collect coins from pay telephones and perform related administrative functions.

[4] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 85-611 (released November 15, 1985), 51 Fed. Reg. 1,400 (January 13, 1986)(*Recommended Decision and Order* ).

[5] *Decision and Order* at para. 17.A

[6] Petition for Rulemaking filed by the New York State Department of Public Service (New York), CC Docket Nos. 78-72 and 80-286, November 15, 1984.

[7] This was part of an overall plan to phase-in the provision of its own billing inquiry service for AT&T customers. *See Recommended Decision and Order* at n. 6.

[8] Section 67.365 (a)(1)(i) of the Commission's rules provides for the separation of Account 645 message toll costs based on "the relative number of business office contacts relating to state toll and interstate toll messages." 47 C.F.R. Sec. 67.365 (a)(1)(i). This is referred to as the customer contact factor.

[9] *See Recommended Decision and Order* at paras. 4 and 5.

[10] The resulting shift of costs to the state jurisdiction has an impact on the allocation of costs in other accounts where such other allocations are based on the allocated Account 645 costs. *See Recommended Decision and Order* at para. 6 and footnote 9.

[11] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Mimeo No. 3400 (released March 25, 1985), 50 Fed. Reg. 14,729 (April 15, 1985) (*Recommended Interim Order* ). The Commission adopted the *Recommended Interim Order* in MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 85-283, released June 7, 1985, 50 Fed. Reg. 26,204 (June 25, 1985)(*Interim Order* ), *recon. denied*, FCC 86-176 (released May 1, 1986), *appeal docketed sub nom.* AT&T v. FCC, No. 85-1470 (D.C. Cir. July 26, 1985).

[12] *See* Decision and Order at para. 17. The Commission made two minor changes to the Joint Board recommendation, raising three subcategories of interexchange carrier costs to full categories and adding service-related subcategories for costs incurred in billing and collection.

[13] See footnote 1, *supra*.

[14] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986) (Detariffing Order). In the Detariffing Order, we deregulated interstate billing and collection services.

[15] Comments filed in response to Recommended Interim Order.

[16] The wage portion of maintenance, traffic, commercial and revenue accounting expense.

[17] Comments made by AT&T at July 30, 1985 NARUC meeting. See Reply Comments of Pacific Bell, filed April 10, 1986.

[18] Detariffing Order.

[19] Amendment of Part 67 of the Commision's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 86-121 (released March 21, 1986), 51 Fed. Reg. 11,035 (April 1, 1986) (Report and Order).

[20] Report and Order. The Commission revised the Part 69 rules, 47 C.F.R. Sec. 69.405(c), governing the recovery of the Account 645 costs allocated to the interstate jurisdiction, and rejected all petitions for extension of time for both Part 67 and Part 69 of the rules. MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 86-121, released March 21, 1986, 51 Fed. Reg. 11,035 (April 1, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 18, 1986

MAXIMUM FEE FOR AMATEUR OPERATOR EXAMINATION

Effective January 1, 1987 the maximum allowable reimbursement for out-of-pocket costs for an amateur operator examination will be $4.37. This amount is based on a 1.87% increase in the Department of Labor Consumer Price index between October 1, 1985 and September 30, 1986.

Volunteer examiners and volunteer-examiner coordinators may be reimbursed by examinees for out-of-pocket expenses incurred in preparing, processing or administrating examinations for Technician, General, Advanced, or Amateur Extra operator licenses. The reimbursement fee from any examinee for any one examination at a particular examination session, regardless of the number of examination elements taken, must not exceed $4.37.

This announcement is made pursuant to Section 97.36 of the FCC rules for the Amateur service.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-107**

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5007 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Saint Marys, West Virginia, | |
| and Marietta, Ohio) | |

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: December 3, 1986 Released: December 17, 1986**

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 51 FR 12178, April 9, 1986, proposing the allotment of Channel 230B1 to Saint Marys, West Virginia, as a substitute for Channel 269A and modification of the license for Station WRRR-FM (Channel 269A) to specify operation on Channel 230B1. The *Notice* was issued in response to a petition filed by Seven Ranges Radio Company ("petitioner"), licensee of Station WRRR-FM at Saint Marys. The *Notice* also proposed the substitution of Channel 240A for Channel 232A, presently occupied by Station WEYQ-FM at Marietta, Ohio, in order to accomplish the substitution at Saint Marys. Employee Owned Broadcasting Corp. ("WEYQ"), licensee of Station WEYQ-FM (Channel 232A) was ordered to *Show Cause* why its license should not be modified to specify operation on Channel 240A in lieu of Channel 232A.

2. Petitioner, in its comments, restated its support for the higher class channel and modification of license and its willingness to reimburse WEYQ for the reasonable costs incurred by changing frequencies. WEYQ submitted a counter-proposal in which it seeks the substitution of Channel 271B1 for Channel 232A and modification of its facilities to specify operation on Channel 271B1 rather than on Channel 240A, as proposed in the *Notice*. Petitioner, in its reply comments, argues against accommodating WEYQ's request in the context of this proceeding if it will delay final disposition herein. In a supplemental pleading, WEYQ stated a willingness to accept Channel 271A so as not to delay action at Saint Marys.

3. Channel 271A can be substituted for Channel 232A at Marietta in compliance with the Commission's minimum spacing requirements with a site restriction of 10.3 kilometers (6.4 miles) north of the community to avoid a short spacing to Channel 272A at Ravenswood, West Virginia. [1] We believe it is appropriate to modify Station WEYQ-FM's license to Channel 271A so as not to delay the Saint Mary's proposal as both parties have acquiesced to this course of action.

4. Channel 230B1 can be substituted for Channel 269A at St. Marys, West Virginia, in compliance with the Commission's minimum distance separation requirements, with the substitution of Channel 271A for Channel 232A at Marietta, Ohio. Since both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been received.

5. Commission policy requires that Station WEYQ-FM be reimbursed for the reasonable costs of changing frequencies from a Class A to another Class A. Petitioner has agreed to reimburse WEYQ for the reasonable costs incurred by making such change.

6. The Commission believes the public interest would be served by the substitution of Channel 230B1 for Channel 269A at Saint Marys, West Virginia, in order to provide that community with its first wide coverage FM station and the substitution of Channel 271A for Channel 232A at Marietta, Ohio, in order to accommodate the Saint Marys substitution. Since no other party expressed an interest in the use of the new channel, we are herein modifying the license of Station WRRR-FM to specify operation on Channel 230B1 in lieu of Channel 269A. See *Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984). The license of Station WEYQ-FM shall also be modified to specify operation on Channel 271A in lieu of Channel 232A.

7. Accordingly, pursuant to the authority contained in Sections 4(i) 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 2, 1987, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED as follows:

| City | Channel No. |
|---|---|
| Marietta, Ohio | 271A |
| Saint Marys, West Virginia | 230B1 |

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Station WRRR-FM, Saint Marys, West Virginia, and Station WEYQ-FM, Marietta, Ohio, ARE MODIFIED, to specify operation on Channel 230B1 (in lieu of Channel 269A) and Channel 271A (in lieu of Channel 232A), respectively, subject to the following conditions:

(a) The licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility:

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting Chief, Policy and Rules Division
Mass Media Bureau

## FOOTNOTE

[1] In a separate proceeding (RM-5438), we shall consider the substitution of Channel 271B1 for Channel 271A at Marietta and the subsequent modification of the license of Station WEYQ-FM to specify operation on Channel 271B1 in accordance with our established policy pursuant to Section 1.420(g) of the Rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-239**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5330
FM Broadcast Stations.
(Faith, South Dakota)

**REPORT AND ORDER**

**(Proceeding Terminated)**

**Adopted: November 20, 1986; Released: December 17, 1986**

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 51 Fed. Reg. 23086, published June 25, 1986, proposing the allocation of Channel 246 to Faith, South Dakota, at the request of the South Dakota State Board of Directors for Educational Television ("petitioner"). Petitioner filed comments supporting the allotment and restating its intention to apply for the channel, if allocated. No other comments were received.

2. As stated in the *Notice*, the petitioner also requested that the channel, if allocated, be reserved for noncommercial educational use, contending that Station KPLO-TV, Channel 6, at Reliance, South Dakota, would preclude the use of the noncommercial educational portion of the FM band. It stated that the proposed station would serve the same population and area which currently receives television service from Station KPLO, thus resulting in interference complaints by the Channel 6 television viewers. The Commission thus requested that the petitioner provide a showing detailing the TV Channel 6 interference which it claimed would occur since our engineering review of the proposal showed that noncommercial educational Channels 205 through 220 could be allocated in compliance with the guidelines established in Docket 20735. [1] We also requested the petitioner to state whether it would apply for the channel if allocated on a non-reserved basis.

3. In its comments, petitioner reiterates that the channel should be reserved for noncommercial educational use. It states that Channel 246 is one of two dozen available Class C channels. Further, it contends that multiple applications usually result from the allocation of a non-reserved channel even though other, non-conflicting channels, are available for allotment. Should this occur, petitioner claims that some of the applicants, including possibly the originator of the allotment, might have to initiate an "expensive and time-consuming process" to allot additional channels. Thus, it seeks the reservation of Channel 246 to eliminate the possibility of competing applications but states that it will apply for the channel even if allocated on a non-reserved basis.

4. The Commission does not generally reserve commercial channels for noncommercial educational use unless such use is precluded by a TV Channel 6 station or by Canadian or Mexican allotments. Here, neither situation exists. Petitioner did not dispute our finding that channels within the reserved portion of the band were available nor did it provide a showing detailing the TV Channel 6 interference which it claimed would occur. While petitioner may find it necessary to compete with other applicants for use of Channel 246 at Faith, no other interests have been expressed and we do not find that the avoidance of this occurring to be a sufficiently compelling reason warranting the reservation of the channel. See *Blue Hill, Maine*, 49 Fed. Reg. 44101, published November 2, 1984, and *Sioux Falls, South Dakota*, 51 Fed. Reg. 4169, published February 3, 1986.

5. While we will not reserve the channel for noncommercial educational use, we do believe that the public interest would be served by allocating the channel on a non-reserved basis, since it could provide the community with its first local service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 2, 1987, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

| City | Channel No. |
|---|---|
| Faith, South Dakota | 246 |

8. The window period for filing applications will open on February 3, 1987, and close on March 4, 1987.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Acting, Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] *Third Report and Order*, 49 Fed. Reg. 45146, published November 15, 1984, 57 R.R. 2d 107 (1984); *recons. Memorandum Opinion and Order*, 50 Fed. Reg. 27954, published July 9, 1985.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 86-404**

In the Matter of

Amendment of Part 90
Subparts M and S RM-5153
of the Commission's Rules.

**ERRATUM**

**Released: December 18, 1986**

On November 28, 1986, the Commission released a *Notice of Proposed Rule Making* in the captioned proceeding (FCC 86-447).

The comment and reply comment dates (pg. 12, para. 108) were misstated in that document. The correct dates are January 30, 1987 and March 13, 1987 respectively.

Also, footnotes 3 and 38-60 were inadvertently omitted. They are included below.

[3] *See Notice of Proposed Rule Making and Notice of* Inquiry, Docket No. 18262, 33 Fed. Reg. 10, 807 (July 30, 1968); First Report and Order and Second Notice of Inquiry, Docket No. 18262, 35 Fed. Reg. 8, 644 (June 4, 1970).

[38] *See Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 20846, 41 Fed. Reg. 28,540 (July 12, 1976); *First Report and Order*, Docket No. 20846, 69 FCC 2d 1831 (1978); 43 Fed. Reg. 38,396 (August 28, 1978); *Second Report and Order*, Docket No. 20846, 89 FCC 2d 741 (1982); *Memorandum Opinion and Order*, Docket No. 20846, 48 Fed. Reg. 29,512 (June 27, 1983); *Notice of Proposed Rule Making*, Docket No. 84-414, 49 Fed. Reg. 25,255 (June 20, 1984); *Report and Order*, Docket 84-414, 50 Fed. Reg. 15,148 (April 17, 1985).

[39] Petition for Rule Making in the Matter of Modification of FCC Rule Sections 90.364 and 90.627 Governing Trunked Specialized Mobile Radio Service System Requirements in Rural Markets, RM No. 5153, filed August 26, 1985 by the American SMR Network Association (ASNA). ASNA is a trade association comprised of SMR licensees.

[40] The loading rules do not permit trunked system licensees to obtain another trunked system within 40 miles of an existing system, unless the existing system is loaded to 80 mobile units per channel. *See* 47 C.F.R. §90.364 of Subpart M and 47 C.F.R. §90.627 of Subpart S.

[41] For instance, ASNA suggests that we allow the licensee of a five channel trunked system to obtain an additional five channels after building the original system, rather than requiring that the original system be fully loaded prior to expansion. ASNA would not permit further expansion of the new ten channel system until at least five channels have been loaded to 80 percent capacity.

[42] Motorola, Inc. is a major manufacturer of land mobile radio equipment and is also licensee of SMR systems. NABER is an association comprised primarily of business radio licensees and users. A section of NABER represents SMR licensees.

[43] *Future Private Land Mobile Telecommunications Requirement* : Final Report, Planning Staff, Private Radio Bureau, Federal Communications Commission, Washington, D.C., August 1983.

[44] *Report and Order*, Gen. Docket Nos. 84-1231, 84-1233 and 84-1234, *supra*.

[45] We originally developed loading standards to test theories on the efficiency of trunked technology. *Second Report and Order*, Docket No. 18262, *supra*., at para. 94.

[46] In the 900 MHz band, SMR licensees can initially obtain ten channels. *See Report and Order* in Gen Docket Nos. 84-1231, 84-1233 and 84-1234, *supra*.

[47] We recently issued a *Notice of Proposed Rule Making* Docket No. 86-78, 51 Fed. Reg. 9,853 (March 21, 1986), in response to a request from the American SMR Network Association (ASNA) proposing that we allow secondary fixed tone signalling and alarm operations by end users of trunked SMR systems.

[48] *See* 47 C.F.R. §§90.366 and 90.631 (establishing three and five year standards).

[49] SMR licensees are permitted to assign their licenses for trunked radio systems only after building an authorized facility. *See* 47 C.F.R. §90.358 of Subpart M and 47 C.F.R. §90.609 of Subpart S.

[50] The use of loading standards requires that we maintain updated loading records for all licensees. This information must be changed constantly and verified by licensee certification letters. Also, any channels recovered must be noted in our records. We verify all loading information before recovering channels. We also must allow 30 days for reconsideration of each recovery action and act on any reconsideration requests. For reassignments of recovered channels in the new SMR channels we must conduct comparative analyses and lotteries. For waiting list applicants, claiming a preference, we must verify all loading information.

[51] *See* 47 C.F.R. §90.155, 47 C.F.R. §90.358 of Subpart M and 47 C.F.R. §90.609 of Subpart S.

[52] Even if we repeal loading generally, we will still occasionally recover SMR channels because of failure to construct, voluntary return and licensee rule and Communications Act violations.

[53] This would be similar to the preference we assign to fully loaded trunked applicants on the waiting list. See 47 C.F.R. §90.360(c).

[54] This would be similar to our comparative point system for the lotteries, see Memorandum Opinion and Order, Docket No. 79-191, supra.

[55] Notice of Proposed Rule Making, Docket No. 86-160, FCC 86-213, (released May 8, 1986).

[56] Of course, it is in the most congested markets that competition is stiffest and channel underutilization occurs least often.

[57] See supra, paras. 26 and 27.

[58] See Background section, supra. The 200 trunked channels are governed by Subpart M and and the 100 conventional channels are governed by Subpart S. In 1978, we allocated an additional 50 channels for conventional use. These channels are also governed by Subpart S. See Order, Docket No. 18262, 43 Fed. Reg. 35,394 (August 9, 1978).

[59] When we released the 250 reserve channels in 1982, we allocated them by service pools rather than by technology in response to an industry request. Most of the 200 trunked channels released in 1974 had been obtained by SMR licensees in the major urban areas. Licensees and representatives from other traditional private radio services requested that we allocate the 250 reserve channels into service pools so that the non-commercial users could expand into the spectrum at their own pace without the risk of all available channels being assigned to SMR systems. Accordingly, we allocated 70 channels for Public Safety, 50 channels for Industrial/Land Transportation, 50 channels for Business and 80 channels for SMR systems. However, we provided for interpool sharing among the 3 non-commercial pools 18 months after the release of the Second Report and Order, in Docket No. 79-191. See 47 C.F.R. §90.621(g).

[60] 47 C.F.R. §§90.611(c) and 90.621(a).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METROMEDIA COMPANY File No. 29700-CL-TC-1-86 . *et al.*

For Consent to Transfer of Control of
Metromedia Company

## MEMORANDUM OPINION AND ORDER

**Adopted December 11, 1986; Released December 18, 1986**

By the Chief, Common Carrier Bureau:

1. Before the Commission are the applications for the transfer of control of all the common carrier licenses of Metromedia Company (Metromedia) to Southwestern Bell Corporation (SBC). SBC agreed to purchase the assets and stock of all of Metromedia's common carrier (other than long distance resellers) subsidiaries and affiliated licensees for $1.65 billion.[1] Metromedia is one of the nation's largest nonwireline cellular and radio common carrier. It controls six cellular licensees serving six major markets: New York, Gary, Chicago, D.C./Maryland/Virginia, Worcester, Boston. Metromedia also has a controlling interest in 30 Public Land Mobile Service (PLMS) licensees operating under 2,118 call signs at nearly eight hundred locations throughout the United States.

2. SBC is one of the seven Regional Holding Companies (RHC) formed as a result of the break-up of American Telephone and Telegraph Company (AT&T), effective January 1, 1984. *United States v. American Telephone & Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). SBC's wholly owned subsidiary, Southwestern Bell Telephone Company (SBTC), provides landline telecommunications services to approximately 8.5 million customers in Arkansas, Kansas, Missouri, Oklahoma and Texas. Southwestern Bell Mobile Systems, Inc. (SBMS), a wholly owned subsidiary of SBC operates cellular systems in St. Louis and Kansas City, Missouri; Wichita, Kansas; Dallas/Ft. Worth and San Antonio, Texas; and Oklahoma City, Oklahoma. SBTC operates paging systems in Arkansas, Kansas, Missouri, Oklahoma and Texas.

3. Pursuant to rule section 22.23(g)(3), SBC requests a blanket exemption from the "cut-off" rules in cases where SBC files amendments to pending PLMS applications to reflect the transfer of control. The exemption is requested so that the pending applications, as amended, will not be "cut-off" from comparative consideration. In addition, the parties request that the grant of the transfer of control application include authority for SBC to acquire any Metromedia authorizations issued during the Commission's consideration of the transfer of control application and the period required for consummation of the transaction following approval. Finally, SBC requests a partial waiver of Section 22.525(e) to permit it to select, within 30 days from the date of consummation, which applications will remain in the processing line and that it be permitted to file traffic loading studies, where appropriate, within 30 days of the consummation, in the cases where Metromedia and SBC may have overlapping paging and two-way applications.

## PETITIONS TO DENY

4. Various Petitions to Deny have been filed. Lin Cellular Communications Corp. (Lin) filed a petition to deny arguing that in order to ensure that cellular technology is exploited to its fullest potential, the Commission should deny the applications and hold that the wireline-nonwireline fence should be maintained until the diverse facilities-based competition it intended to promote is given the opportunity to develop. Lin maintains that, independently of whether the Commission's decision in *James F. Rill*, 60 Rad. Reg. 2d 583 (1986), is correct or not, the subsequent avalanche of proposed nonwireline acquisitions by the RHCs would totally frustrate the purpose of the fence which was to ensure that nonwireline licensees would compete with wireline licencees. In addition, Lin contends that the need to preserve the fence is particularly acute in the case of the applications at issue here. Absent the competitive spur of nonwireline cellular providers, RHCs have no incentive to exploit fully the potential of cellular technology to become a substitute for local landline service, a potential that the Commission itself has acknowledged, according to Lin. Lin argues that RHCs would relegate cellular to the status of an adjunct, specialty service. According to Lin, SBC has engaged in a series of actions in its home market relating to such matters as interconnection and roaming service that strongly suggest its intent to limit cellular service in this manner. Finally, Lin maintains that the financing provisions of the agreement raise a substantial question as to whether the transactions proposed therein would violate the separate subsidiary requirement imposed on SBC by Section 22.901(c) of the Commission's rules.[2]

5. McCaw Communications Companies, Inc. (McCaw) asserts that the transfer will impair McCaw's competitive capabilities with the acquisition of the Cellular One trade name by SBC. (McCaw uses this trade name in markets where it competes directly with SBC's cellular subsidiary.) In addition, McCaw alleges that SBC's acquisition of the Cellular One trade name could preclude McCaw from advertising, marketing and promoting wide-area cellular service it intends to provide. Finally, McCaw alleges that SBC engages in unreasonable and discriminatory interconnection practices which should be investigated before the instant transfer of control is authorized.

6. Celcom Communications Corporation (Celcom) requests that the Commission undertake an inquiry into this proposed acquisition. This acquisition according to Celcom appears to be the centerpiece of a plan by SBC to control the most significant nonwireline cellular properties in the Northeastern United States. If successfully implemented, Celcom argues, this plan could have serious adverse consequences both regionally and nationally on competition in the cellular industry and on the Commission's carefully-structured cellular program. Celcom contends that these acquisitions suggest a trend toward a "seven member oligopoly" in the cellular industry. It submits that the Commission should require SBC and Metromedia to provide the detailed information necessary to assess the economic, competitive, and structural impact

of this program of acquisitions before any decision is made on the pending transfer of control applications. Celcom further alleges that at a bare minimum the Commission should require SBC to state whether it intends to pursue acquiring any interest in the New York and Philadelphia franchises in the future.

7. In Opposition, Metromedia contends that McCaw does not have standing to file a Petition to Deny. McCaw does not allege economic injury of any kind resulting from the transfer of control of the cellular licenses. McCaw is not a competitor in any of the makets listed in the transfer applications nor does it establish with any specificity that it will suffer, or is likely to suffer, any cognizable injury as a result of the transfer. However, if the petition is not dismissed it should be denied because McCaw's arguments are speculative and without merit. Metromedia maintains that McCaw is basically asking the Commission to intervene in a purely private contractual matter and to examine the conduct of SBC's affiliates. These issues are irrelevant to the transfer applications, according to Metromedia.

8. In opposition to Lin's petition Metromedia argues that Lin's petition should be denied because it is not supported by an affidavit as is required by Section 309(d)(1) of the Communications Act and because Lin lacks standing. Metromedia alleges that the Lin petition does not contain an affidavit which attests to the accuracy of the allegations concerning the development of cellular technology and the role of the nonwireline cellular carriers in developing cellular technology. Moreover, the allegations are not the sort of which the Commission may take official notice, according to Metromedia. In addition, the verification by affidavit cannot be waived Metromedia contends.[3] Furthermore, according to Metromedia, Lin has not alleged economic injury of any kind. Lin is not a competitor in any of the markets listed in the applications; thus, it has failed to establish that it would suffer, or is likely to suffer, any cognizable injury as a result of the transfer. According to Metromedia, Lin has offered no evidence except generalized unsupported allegations that it will somehow be injured by SBC's acquisition of Metromedia's cellular interests. Metromedia contends that even without the transfer, Lin would continue to compete with SBC in the Dallas/Fort Worth market, and SBC's telephone and cellular operations within its region would continue unchanged. Thus, by Lin's own admission, Metromedia argues, the alleged injury is not traceable to Commission action on the transfer. If nonwirelines are the driving force behind cellular technology as Lin asserts, then according to Metromedia, it follows that the remaining nonwirelines, such as Lin, would benefit from the transfer. Moreover, Lin has provided no evidence that the conduct of SBC's affiliates has retarded the development of the cellular industry. Metromedia argues that Lin therefore has not shown a probable injury of a substantial character, and it has failed to demonstrate standing.

9. Furthermore, Metromedia argues, if the petition is not dismissed it should be denied because Lin's arguments are without merit and have been previously rejected by the Commission. According to Metromedia, Lin is asking the Commission to retain the wireline-nonwireline fence only until it is ready to sell its cellular interests. In addition, the Lin petition is really an untimely petition for reconsideration of *James F. Rill*, 60 Rad. Reg.2d 583 (1986). Lin failed to provide any evidence for its contention that without nonwireline competition cellular's development will be retarded. Moreover, according to Metromedia, if Lin's assertion is true, then Lin as the innovative nonwireline competitor would be the beneficiary of increased wireline participation. Finally, Metromedia contends that Lin's petition should be summarily denied because it raises arguments that were addressed and rejected by the Commission in *Rill, supra*, .

10. Metromedia alleges that Celcom's letter is procedurally defective as a petition to deny and must be treated as informal comments by an entity with no interest in the instant transfer applications. The letter, according to Metromedia, is bereft of facts, rife with speculation and is unburdened by any material relevance to the issues properly before the Commission. Metromedia alleges that Celcom is attempting to institute a "fishing expedition" based on unfounded speculation and innuendo, and as such must be viewed as an abuse of Commission process. According to Metromedia, it strains credulity for Celcom to claim that Southwestern Bell is wresting control of the "Northeastern market" by acquiring interests in Washington/Baltimore and Boston/Worcester. In addition, since there is no issue of "trafficking" presented, the price that SBC is paying for the Metromedia properties is irrelevant. (There are no unconstructed facilities or facilities operated for less than one year.) Metromedia also contends that the Celcom letter must be viewed as an improper collateral attack on recent Commission decisions holding that the public interest would be served by granting consent to the acquisition of substantial nonwireline cellular interests by wireline carriers. Contrary to Celcom's speculation, there are no agreements, implicit or explicit, between Metromedia and SBC regarding the conveyance of Metromedia's interests in the Philadelphia and New York nonwireline cellular markets, according to Metromedia.

11. SBC, in opposition, alleges Lin has failed to provide any grounds that would support a reversal of the Commission's pro-competitive policy: that after initial cellular licenses have been granted, the marketplace must be allowed to work freely. According to SBC, the acquisition will not reduce nationwide availability of cellular service. SBC maintains that having invested a substantial sum to acquire Metromedia's cellular properties, it has every incentive to achieve a return on its investment by every available means, including aggressive marketing, efficiency of operation, or advances in technology. Moreover, there will be competition to the cellular system wireline carrier from a well managed and well financed entity, regardless of its ancestry, states SBC. In addition, the fact that SBTC's revenues and rate base are subject to bypass by a variety of technologies does not support Lin's allegations that SBC will not have an incentive to promote cellular technology, SBC maintains. As a matter of fact, according to SBC, having invested heavily in these systems, SBC has every incentive to foster the growth of cellular business and technology. Finally, SBC asserts that the other arguments concerning interconnection in Lin's petition are insufficient, and the petition fails to raise any substantial factual issues that warrant denial of the applications. SBC maintains that the complaints are already the subject of separate proceedings pending before federal or state regulatory agencies,are irrelevant, or are incorrect.

12. SBC responded to Celcom's letter alleging it is an unauthorized pleading since it is clearly not a petition to deny. Moreover, SBC contends that Celcom lacks stand-

ing to complain about the applications because Celcom is merely an unsuccessful applicant in the New York and Philadelphia markets: markets which are not at issue in this proceeding. Moreover, SBC argues, even under Celcom's secret sale agreement theory (for the New York and Philadelphia markets), Celcom has not alleged any facts which if true, would cause it harm. Moreover, SBC responds that the secret agreement theory between it and Metromedia for the Philadelphia and New York markets is untrue and has no basis in fact.[4] The balance of Celcom's letter addresses questions regarding the purchase price of the properties which are the subject of the pending applications and the allocation of the purchase price reduction to New York and Philadelphia. SBC states that Celcom's entire discussion is based on hearsay and speculation from parties having no knowledge of the transaction.

13. McCaw's only interest in the Cellular One trademark is as a licensee in several markets; it has no ownership rights in the trademarks, and the competitive harms alleged by McCaw have no factual support, according to SBC. The trademarks are an asset of Washington/Baltimore and McCaw's status as a licensee of the trademarks in several locations does not supply it with grounds to contest the proposed transfer of control of the owner of the trademarks. Moreover, other major nonwireline cellular service providers, such as Lin Cellular Communications Corporation and Cybertel, have chosen not to use the Cellular One trademark to identify their operations; thus, they apparently do not believe that the Cellular One trademarks are vital to their competitive posture, according to SBC. In addition, SBC contends that McCaw's arguments fail to allege any grounds for denying the transfer of control since it chose to use the trademarks and to abide by the trademarks licensor's quality standards even though it had no assurance that the ownership of the licensor would not change.[5]

14. Lin alleges it has standing since it is a party in interest which will be substantially injured by the acquisition. For instance, Lin alleges that its New York and Philadelphia affiliates intend to enter into agreements with other nonwireline licensees in the Northeast corridor to permit regional cooperative arrangements in competition with a similar wireline venture; the acquisitions by SBC may well make such regional arrangements virtually impossible. The acquisition, according to Lin, jeopardizes the system established by the Commission for facilities based, nonwireline competition for cellular service. To permit a system of competition solely between Bell Operating Companies (BOC) will not foster the kind of affordable,.and nationally available cellular service that the Commission has long sought to foster.[6] Lin also contends that SBC has demonstrated disinterest in developing cellular service as anything more than a secondary optional telecommunications service. Moreover, according to Lin, SBC is still refusing to provide the type of interconnection sanctioned by the Commission. Furthermore, Lin contends, SBC does not provide adequate roaming or resale arrangements.[7]

15. Celcom in a reply contends that the information provided by Metromedia and SBC is not sufficient for the Commission to make an informed public interest determination. For instance, it alleges that the sale agreement has never been submitted by the parties to the Commission. Finally, Celcom contends that the Commission should take this opportunity to assess the impact of regional concentration on the cellular industry and provide coherent guidelines to current and prospective participants in the industry.[8] Thus, the Commission should require SBC and Metromedia to submit all documents pertinent to the proposed acquisition and then permit additional public comment on those documents.[9]

16. According to McCaw, it has standing to file its petition since it has demonstrated it will suffer substantial injury as a direct result of the grant of the transfer applications. Moreover, the Commission has always followed a flexible approach towards standing and in any case it has not allowed considerations of standing to bar Commission review of important public interest isssues. McCaw also alleges it has demonstrated that SBC's accession to the role of owner and licensor of the Cellular One trade name and mark would have a chilling effect on McCaw's decision making and entrepreneurial discretion.[10] Moreover, according to McCaw, the Commission has never hesitated to intervene in private contractual matters to protect and promote its rules, policies and the public interest. Therefore, McCaw requests that the Commission undertake detailed factfinding concerning SBC's intentions for the Cellular One name, or, alternatively, condition its action on the instant applications on SBC's agreeing either to divest itself of the right to license the Cellular One name or abide by specific guidelines, designed to protect non-wireline interests, in exercising that right. In addition, McCaw contends that SBC's practices concerning interconnection, diverge from the policies of the Commission, and reflect adversely on SBC's character and ability to operate the Metromedia cellular facilities in the public interest. SBC's inability to provide Type 2 interconnection to non-wireline cellular carriers in a timely fashion also casts doubt on whether the public interest would be served by authorizing the transfer of additional cellular licenses to it, McCaw maintains. Furthermore, SBC continues to impose recurring charges for NXX codes despite unequivocal Commission directives against this practice, according to McCaw. Finally, McCaw argues that SBC has lacked candor in its claims in that it has responded diligently to the need for a Type 2 interconnection tariff for the State of Texas. Accordingly, McCaw requests that the Commission deny the transfer applications until SBC accepts the Commission's requirements with respect to cellular interconnection.

## RHODE ISLAND

17. Omni Communications, Inc. (Omni) requests that the Commission place a condition upon the grant of the Rhode Island application (PLMS station DRS653). Omni states that it is the licensee of station DSV954 operating in and around Boston, Mass. in coordination with Zipcall, Inc. (a Metromedia subsidiary) pursuant to a guardband sharing agreement. Omni is also a party to an Inter-Carrier Operating Agreement with Mobilphone-Paging Radio Corporation which was intended, according to Omni, to give it access to the frequency 158.70MHz in Rhode Island. Omni claims that since Metromedia acquired control of Mobilphone, Metromedia has taken steps to abrogate Omni's access to the frequency in Rhode Island, thus causing Omni to suffer a direct and substantial competitive harm. According to Omni, by allowing Metromedia to acquire control of Mobilphone the Commission has created a "bottleneck", whereby Omni's right of access in Rhode Island is controlled by its competitor

in Boston. Thus, Omni alleges that the Commission can only find the transfer from Metromedia to SWB serves the public interest if it places a condition on the Rhode Island licensee which serves to protect Omni's rights of access to the frequency in Rhode Island. Omni requests that the condition require the licensee to coordinate its use of the frequency with Omni's station, KSV954.

18. In opposition, Metromedia alleges that the Omni petition must be dismissed because it lacks the requisite standing under Section 309 (d)(1). Moreover, the petition if not dismissed must be denied because its arguments are totally without merit and concern a purely private contractual matter which is in no way related to the transfer application, according to Metromedia. Finally, Metromedia maintains that the petition is a bald-faced attempt to extort from it concessions to which Omni is not entitled under an existing inter-carrier agreement; thus, the petition is nothing more than an abuse of the Commission's processes.

19. Omni in reply contends it does have standing since it demonstrated competitive injury of a direct and substantial nature. The harm is within the zone of interests protected by the Communications Act, and has a direct relationship to the transfer application under consideration, Omni alleges. In addition, Omni contends that contrary to Metromedia's claim, the Commission does have jurisdiction in this case. According to Omni, it is not asking the Commission to interpret or modify a contract. Rather, it is asking the Commission to invoke its licensing authority by placing a protective condition on a transfer authorization in order to promote competition.

## Discussion

20. Arguments similar to the ones advanced by Lin have previously been considered by the Commission, and rejected.[11] The Commission adopted a wireline/nonwireline frequency allocation policy for a number of reasons bearing on the public interest. Separate licensing of wireline and non- wireline carriers was expected to expedite the introduction of cellular service by limiting the pool of eligible applicants for one of the two frequency blocks (*i. e.*, the wireline block), thereby making settlements likely for that frequency block and giving the applicants for the other block a powerful incentive to settle as well. *Cellular Communications Systems*, 86 FCC 2d 469, 490-91 (1981), *recon.*, 89 FCC 2d 58, 72, 76 (1982), *petition for review dismissed sub nom., United States v. FCC*, No. 82-1256 (D.C. Cir. March 3, 1983); *Cellular Lottery Rulemaking* , 98 FCC 2d 175, 196-97 (1984).[12] The Commission also found that a separate allocation would most effectively utilize wireline carriers' technical expertise, 86 FCC 2d at 488-89, 89 FCC 2d at 71, and would serve to give both wireline and nonwireline carriers an opportunity to enter the cellular industry, consistent with the traditional competitive structure of the common carrier mobile industry. 86 FCC 2d at 491; 89 FCC 2d at 73; 98 FCC 2d at 194-96. The Commission has always viewed this set-aside as a temporary measure related to the application process, scheduled to "sunset" as the period for filing initial applications expires.[13] *Id.*

21. During the initial application process governed by the set-aside, the Commission has held that entities filing or prosecuting cellular applications must be under the *control* of a carrier eligible for the frequency block applied for. *Advanced Mobile Phone Service, Inc.*, 93 FCC 2d 638, 692 (1983) (*Los Angeles Decision* ). Minority participation in a partnership or joint venture application by a carrier ineligible to apply in its own right was held not to contravene the policies underlying the set-aside. *Id.* The Commission emphasized that "[t]he eligibility requirement expressly pertains to application eligibility, not ownership participation." *Id.*

22. In the *Los Angeles Decision* the Commission expressly struck down as violative of the limited nature of the set-aside a provision in a wireline limited partnership agreement that indefinitely restricted the transfer of partnership interests to wireline carriers. It held that the primary purpose of the set-aside was to minimize licensing delay and expedite the provision of service, and that prolonging the effect of the set-aside beyond that required to achieve that end would contravene the Commission's intent to minimize the anticompetitive effects of the set-aside by placing a limit on its duration. 93 FCC 2d at 693-94.

23. In permitting Pacific Telesis to acquire a minority interest in the nonwireline franchise in San Francisco and San Jose the Bureau stated:

> We have carefully examined the Commission's expressed reasons for its adoption and retention of the wireline/non-wireline separate allocation policy, and conclude that the policy is satisfied by the issuance of construction permits to entities controlled by eligible parties. Once both carriers have received authorizations, the primary purpose of the set-aside --expediting the availability of cellular service -- will clearly have been served to the extent possible, and further maintenance of an inflexible set-aside governing ownership would have to be justified on some other ground. The efficient utilization of wireline expertise, one of the other purposes underlying the policy, would not appear to be served by maintaining a bar on ownership interests that cross the "fence." If wireline carriers have expertise that may be valuable in implementing cellular operations, there is no reason why a non-wireline cellular licensee should be prohibited from utilizing that expertise. . . Finally, the Commission sought by its set-aside to give both wireline and non-wireline carriers an opportunity to become involved in providing cellular service. Once we have granted authorizations to the two competing systems, that opportunity has been realized; if a non-wireline, non-controlling partner chooses, after taking advantage of its chance to become involved in cellular, to transfer its interest to a wireline carrier of its choosing, we see no compelling public purpose that would be served by requiring it to find another non-wireline taker. Maintenance of the traditional wireline/non-wireline industry structure does not appear to be a valid reason for preventing the alienation of a minority interest to a carrier which would not have been eligible to apply in its own right.

*McCaw Communications of San Francisco, Inc.*, FCC 2d, released March 7, 1985. (*BACTC Order* )

24. The Bureau also stated in that order, "The Commission's order extending the duration of the set-aside supports this conclusion. In suspending the expiration of the

policy, the Commission made it clear it was doing so on behalf of applicants in markets below the top 90, for which applications had not yet been filed." *Id.* The Commission had said its extension of the set-aside merely preserves the status of the markets not yet filed for, pending a decision [in the lottery rulemaking] as to whether a separate frequency allocation should govern those markets. *Cellular Radio Service*, 55 RR 2d 823, 824 (1984). In deciding to use lotteries, the Commission found that there were reasons "which militate toward retaining the set-aside both for markets below 90 and for markets already on file." 98 FCC 2d at 194. The Commission decided not to eliminate the set-aside for markets 31-90, for which application were on file, because of the need to reopen the markets for new filings. *Id.* at 197-98. Thus, in the *BACTC Order*, the Bureau held: "the Commission's language regarding the set-aside is closely tied to application processing concerns, and we cannot conclude that it intended to preclude the transferability of any ownership interest in authorized systems across the "fence" indefinitely. The *Los Angeles Decision* confirms this conclusion: the Commission made clear that the focus of the set-aside is *application eligibility*, not *ownership participation*.

25. In a subsequent Order, the Commission favorably cited the previous language and concluded that the wireline/non-wireline dichotomy is in large part an application processing tool, and to that extent the policy is satisfied by the issuance of construction permits to entities controlled by eligible parties.[14] Once both carriers have received authorizations, the primary purpose of the set-aside – expediting the availability of cellular service – will have been served, and further maintenance of an inflexible set-aside governing ownership is not justified. The efficient utilization of wireline expertise, one of the purposes underlying the policy, would not appear to be served by maintaining a bar on ownership interests that cross the fence. The Commission sought by the set-aside to give both wireline and non-wireline eligibles an opportunity to become involved in providing cellular service. Once authorizations are granted to two competing systems, that opportunity has been provided; if a non-wireline chooses, after taking advantage of its chance to become involved in cellular to transfer its interest to a wireline carrier of its choosing, we see no compelling public purpose that would be served by requiring it to find another non-wireline taker. Maintenance of the traditional wireline/non-wireline industry structure does not appear to be a valid reason for preventing the alienation of a cellular franchise to a carrier which would not have been eligible to apply in its own right. Thus, the transfer of control of a non-wireline franchise to a wireline carrier, or vice versa, in not contrary to the Commission's set-aside policy. *James F. Rill*, 60 Rad. Reg. 2d (P&F) 583 (1986) *partial recon. granted*, FCC 86-520, released November 28, 1986.

26. In this case the Commission also stated:

> The market structure created by the Commission will remain in place. We will have two providers in each market. The set-aside will not be used to prevent market entry or to prevent the free flow of market forces. We agree with CI that the Petitioners, in advocating the perpetuation of the set-aside into the indefinite future, seek to convert what the Commission intended as a procompetitive measure of temporary duration into a shield to insulate nonwireline cellular carriers from the full rigors of the marketplace. Petitioners seek not to assure or preserve vigorous facilities-based competition between Block A and Block B systems, but rather seek to protect their private interests as individual competitors. *Id.*

27. Lin's allegations concerning the wirelines disincentive to exploit fully the potential of cellular technology to become a substitute for local landline service has also been addressed by the Commission previously . In *Rill*, *supra*, the Commission stated:

> We disagree with petitioners' contentions that allowing these transfers will have adverse competitive effects on the cellular industry. It appears that cellular will probably not become a significant substitute for landline service in most areas of the country because of its price and limited capacity. 89 FCC 2d 67. Recently, we stated that "cellular service is a local exchange radio service under Section 2(b) and 221(b) of the Communications Act of 1934, which is a natural extension of local exchange landline service, and we suggested that cellular communication 'may over time', supplant landline local exchange service in some areas." *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 194-95 (1984), *recon.*, FCC 85-117, released May 3, 1985; *Rural Cellular Service*, 58 RR 2d at 517 (1985). Cellular systems lack the requisite bulk capacity to serve as a meaningful substitute for landline local exchange service. *Cellular Systems*, 86 FCC 2d at 484, 89 FCC 2d at 67-68; *Rural Cellular Service*, *supra* at 519, 521. While cellular technology may provide a less expensive alternative to landline in providing basic telephone service in a few instances, cellular radio was not intended as a wholesale substitute for basic landline communication. *Id.*

28. In addition, in the cited case the Commission held that since cellular is properly viewed as a complement to landline communications capable of serving the large unsatisfied demand for mobile communications, wireline carriers will have the same incentive as any nonwireline carrier to aggressively develop this adjunct to their wireline local exchange facilities to meet the present unsatisfied mobile demand. *Rill*, *supra*. In addition, the Commission held that there is no reason to believe that Regional Holding Companies, their affiliates or subsidiaries, will not develop and promote cellular radio to its fullest. The cellular operations of the Regional Holding Companies are fully separated from their local telephone exchange companies. The Commission went on to state that it has seen no evidence to date that the cellular subsidiaries have retarded their own growth in order to benefit their sister companies' local exchange operations. *Rill*, *supra*.

29. We are still convinced that there is an efficient level of competition in the industry and Lin has not convinced us otherwise. While the RHC's share of the market has grown and will grow from the approval of transfers like the instant case, petitioners have presented no evidence in this case to support a claim of anticompetitive concentration in the cellular industry. In addition, as the Commission held in the *Rill Order*, supra, the Regional Companies have shown themselves to be aggressive com-

petitors with one another in many markets they have entered and those they seek to enter. *See United States v. Western Electric Co.*, slip op. at 14; *United States v. Western Electric Co.*, 592 F. Supp. 846, 862 (D.D.C. 1984).

> We agree with Pacific that the separate allocation is itself evidence of the Commission's determination that a wireline's investment in local exchange facilities does not of itself jeopardize the development of beneficial facilities-based competition. Implicit in the adoption of the dual allocation scheme for cellular was the Commission's recognition that so long as one frequency block operator has no substantial investment in the local exchange facilities within the same relevant geographic market, facilities-based competition is not jeopardized. *See Reconsideration Order*, 89 FCC 2d at 67. Facilities-based competition is therefore jeopardized only where both frequency block system operators have a substantial investment with the local exchange carrier within the relevant geographic market. *Rill, supra.*

30. Similarly in the instant case, SBC will be acquiring cellular systems outside of its own certificated landline area. Thus, it can be assumed that SBC will compete vigorously against the local Regional Company holding the wireline franchise. Facilities based competition is not jeopardized since SBC does not have a substantial investment with the local exchange carrier within the relevant geographic market. SBC's acquisition of Metromedia's interests does not give rise to any such anticompetitive circumstances. All of Metromedia's interests are outside the service areas of SBC's local exchange affiliates.

31. We find that the transfers in this case are not contrary to the set aside, do not pose anticompetitive effects and are in the public interest. We disagree with Celcom that we do not have sufficient information to make this determination. The transfers here do not raise any significant competitive concerns under the public interest standard. There will be competition in the cellular industry.[15]

32. Nonwireline companies are an important competitive force in the cellular industry. Nonwireline companies retain a significant presence in the cellular industry and we are not aware of any evidence that SBC specifically is seeking to restrain the development of cellular technolgy. Moreover, we do not believe that there is a sufficient current risk of wireline control of cellular technology, innovation or of coordinated anticompetitive activities by wireline companies to warrant denial of these transfers.[16] As the Commission has stated in the past, we are not here to promote the well being of one particular group. We will not insulate nonwireline carriers from the full rigors of the market place. *Rill, supra.*

33. We must agree with SBC and Metromedia that McCaw's other arguments concerning the Cellular One trademark fail to raise any grounds for denying the transfer of control applications. One of the transfer of control applications is for the Washington/Baltimore Cellular Telephone Company (Washington/Baltimore), the nonwireline licensee for the Washington, D.C./Baltimore, Maryland market. According to SBC, Washington/Baltimore has federal trademark registrations for the trademark "Cellular One" and for a design trademark that contains the words "Cellular One". Washington/Baltimore has licensed the trademarks to a number of nonwireline cellular providers. By the transfer of control SBC will acquire the controlling interest in Washington/Baltimore. We agree with SBC that the trademarks are an asset of Washington/Baltimore, and that McCaw's status as a licensee of the trademarks in several locations does not give it grounds to contest the proposed transfer of control of the owner of the trademarks. Moreover, McCaw chose to use those trademarks and to abide by the licensor's quality standards even though it had no assurance that the ownership of the licensor would not change. Thus, in effect what we have here is a private contractual matter (licensing agreement). McCaw does not argue that there is a contractual limitation to the use of the Cellular One trademark, and we will assume that the Cellular One trademark could have been sold to SBC to begin with. The Commission has consistently indicated it will not adjudicate claims arising out of private contractual agreements; the appropriate forum for private litigation is the courts. *See Answering Service Limited*, Mimeo No. 5642, released August 4, 1983. *See also Telephone Communications, Inc.*, Mimeo No. 4649, released June 9, 1983.[17] The cases cited by McCaw in support of the allegation that the Commission does not hesitate to intervene in private contractual matters are inapposite to this case. Therefore, we will deny McCaw's petition and requests.

## RHODE ISLAND

34. We agree with Metromedia that Omni's allegations also refer to a private matter between the parties. Thus, we reiterate what we stated above that we will not interfere with private contractual matters. According to Metromedia, Omni and ZipCall (Metromedia's subsidiary) operate frequency 158.70 MHz in Boston by virtue of a time-sharing agreement. Mobilphone (Metromedia's subsidiary), according to Metromedia, is the exclusive licensee for frequency 158.70 MHz in the state of Rhode Island. Metromedia asserts that Omni and Mobilphone entered into an inter-carrier agreement under which tone-only paging customers of each party have access to the other party's 158.70 MHz system. Metromedia asserts that Omni enjoys access to the facilities under the intercarrier agreement, and that Mobilphone has not violated the agreement. What Omni in effect is requesting is for the Commission to interpret the inter-carrier and time sharing agreements by alleging Metromedia is acting in an anticompetitive manner. Omni has failed to demonstrate Metromedia is acting in an anticompetitive manner. Moreover, there are other proper forums to interpret the agreement. Thus, Omni's petition will be denied.

35. We find SBC qualified to hold the licenses involved in these transfers. We also find that approving the transfers will serve the public interest, convenience, and necessity.[18]

36. Accordingly, IT IS ORDERED, that the applications filed by the parties, seeking consent to the transfer of control of various radio licenses from Metromedia Company to Southwestern Bell Corporation ARE GRANTED, effective upon the release of this order.

37. IT IS FURTHER ORDERED, that the petitions to deny filed by Lin Cellular Communications Corp. and McCaw Communications Companies, Inc., the informal request for Commission action filed by Celcom Communications Corp. and the Petition to Condition Authorization filed by Omni Communications, Inc. ARE DENIED.

38. IT IS FURTHER ORDERED, that the grant is conditioned upon Commission approval of the Southwestern Bell Corp. capitalization plan as required by Sections 22.901 (d)(3) and 64.702 (d)(4).

39. IT IS FURTHER ORDERED, that the request for exemption from the cut-off rule pursuant to Section 22.23(g)(3) and the request for partial waiver of Section 22.525(e) limited to 30 days ARE GRANTED.

40. This Order is issued under Section 0.291 of the Commission's rules and is effective immediately. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this Order. [see Rule 1.4(b)(2)].

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

## FOOTNOTES

[1] On September 11 and 17, 1986, Metromedia filed amendments to the transfer of control applications. The amendments provided that the purchase agreement was modified so that Metromedia's New York, Philadelphia, and Dallas cellular interests are no longer included in the sale, and as a result, the purchase price was reduced by $452.9 million. On October 27, 1986, Metromedia filed a minor amendment which clarifies that SBC is acquiring 100% of Yankee Celltell Company (YCC) (the Boston nonwireline cellular licensee) from Metromedia. (On October 23, 1986, the Commission consented to the transfer of Graphic Scanning Corporation's 50% interest in YCC to Metromedia). The amendment further stated that SBC has agreed to purchase the minority ownership interests of the remaining parties of the Washington/Baltimore Cellular Telephone Company (WBCTC). (SBC will acquire 100% ownership of WBCTC.)

[2] Lin generally asserts that the agreement with Metromedia contains guarantees of repayment by SBC inconsistent with Section 22.901(c) and questions whether SBC has sources of funds sufficient to cover repayment without recourse to funds necessary to conduct its telephone operations. We conclude from our review of the SBC capitalization plan that the financing does not violate the separate subsidiary requirements and that there are sufficient funds to cover the transaction. Our specific findings on Lin's argument are more appropriately detailed in the order, to be released shortly, addressing the SBC capitalization plan.

[3] The affidavit of Dan Yost, the President and General Manager of Metroplex, the Dallas, Texas nonwireline carrier, merely describes negotiations between SBC's subsidiaries and Metroplex concerning interconnection and roaming, and is not verified, states Metromedia.

[4] SBC submits an affidavit of J. B. Ellis, Group President of SBC and representative of that company in negotiations with Metromedia for the acquisition at issue in this case. Mr. Ellis in his affidavit denies Celcom's claims. There is no agreement between Metromedia and SBC for some future purchase of Metromedia's interests in New York and Philadelphia, according to Mr. Ellis.

[5] SBC contends that McCaw's interconnection complaints have no relevance to the proposed transfer of Metromedia's cellular licenses in cities far removed from SBTC's operating territory. For the Commission to deny the pending applications because of interconnection disputes that are pending in other forums would be improper and a denial of due process according to SBC. Moreover, McCaw itself favors the solution of cellular interconnection matters with SBTC on a state-by-state basis rather than on a regional (or presumably, in this case, at a national) level. SBC submitted a letter from Dan Yost, President of Metroplex Communications attesting to this.

[6] According to Lin, SBC's proposal, coupled with the pending proposal of Bell South to acquire control of Lin's 50% voting partners in Los Angeles and Houston, would place negative control of five of the top 10 nonwireline cellular licensees in the hands of the RHCs, as well as those in other top 30 markets. This, Lin contends, must be justified by "some compelling reason" and no such reason has been proffered by the parties to this transaction.

[7] Lin also states that contrary to SBC's unsubstantiated assertion, Lin has entered into an agreement with Metromedia's Washington/Baltimore cellular venture for the rights to use the name Cellular One and the associated logo.

[8] Celcom alleges that SBC in addition to controlling the Northeast Corridor, would achieve control of 4 out of the top 10 markets if it ever acquired the Philadelphia and New York markets.

[9] In a letter dated December 3, 1986, Celcom contends that from documents filed in a state proceeding [Lin Broadcasting Corp. v Metromedia, No. 24478-86 (N. Y. Sup. Ct., N. Y. County)] it has verified that SBC indeed was going to pay a substantial premium for the New York and Philadelphia cellular systems. Thus, it alleges that it is obvious that the transaction between Metromedia and SBC is more than it purports to be and the Commission should scrutinize it closely.

[10] McCaw markets the nonwireline service it provides in markets throughout the nation under the Celluar One trademark. By acquiring the Cellular One trademark SBC would have the opportunity to disrupt advertising, promotion and sales activities in all McCaw markets, including four - Kansas City, Oklahoma City, San Antonio and Wichita - in which McCaw and SBC's cellular subsidiary are direct competitors.

[11] Since we are addressing the merits of all the petitions filed in this case the arguments advanced by Metromedia and SBC concerning standing are moot. We also find Lin's petition was properly verified. Celcom's letter is being treated as an informal pleading.

[12] The Commission found that expediting the availability of cellular service by means of the set-aside policy was justified by the congestion on existing mobile systems and the pressing need for improved service in major markets. 86 FCC 2d 489-90; 89 FCC 2d at 70.

[13] The Commission originally intended the set-aside to expire after five years, under an application filing scheme using conventional filing and cut-off procedures. 86 FCC 2d at 488. It subsequently shortened this to two years, while it revised the filing procedure to provide for date-certain filings. 89 FCC 2d at 70. When it became clear that application filings for all markets could not be accommodated during that two-year period, the Commission suspended the expiration of the set-aside, *see Cellular Radio Service*, 55 Rad. Reg.2d 823 (1984), and then stated it would retain a separate allocation scheme for all initial filings, 98 FCC 2d at 198.

[14] If the purpose of the set-aside had been to regulate the subsequent ownership structure of the industry, we would not have deemed it necessary to "narrowly tailor" the duration of the set-aside to the need to expedite cellular service by imposing an automatic "sunset." The set-aside's life span would be independent of filing procedures rather than existing merely as an incident of such procedures.

[15] Competitive considerations alone are not necessarily determinative of the public interest, and the Commission is not strictly bound by antitrust laws in making its decision. Instead, it must weigh a multiplicity of factors, including those unique to the particular industry. *U. S. v. FCC*, (*SBS* ), 652 F. 2d at 88. In SBS the Court held that the Commission may find that the public interest benefits of a particular proposal may warrant its approval even if it is assumed to have substantial anticompetitive effects. Id. at 94-95, 102-06.

[16] Interconnection claims are before the Commission in another proceeding and will be addressed there. If any further action has to be taken it will be determined in those proceedings. *See In the Matter of the Need to* Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Mimeo No. 36487, released March 5, 1986, recon. pending. Moreover, SBC now provides the roaming that Lin complained of.

[17] McCaw's concerns about SBC's future use of the trademarks are speculative and do not raise any grounds for denying these transfer of control applications.

[18] Pacific's request for conditional waiver of sections 90.352(c) and 90.603 (c) to permit it to acquire control of Metromedia's SMR systems will be addressed subsequently.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released:December 17, 1986

REPORT OF MEET POINT BILLING TASK FORCE FILED;

COMMENT AND REPLY DATES SET

CC DOCKET NO. 86-104

On December 1, 1986, the Meet Point Billing Task Force of the Exchange Carriers Standards Association, Inc. (ECSA) filed a Report adopted by ECSA's Ordering and Billing Forum, Carrier Liaison Committee. The Report contains proposals for implementing meet point billing and is in response to the Common Carrier Bureau's Memorandum Opinion and Order in CC Docket No. 86-104, Mimeo No. 3402, released March 28, 1986.

Interested parties may file comments on the Report no later than January 20, 1987, and replies may be filed no later than February 4, 1987. Comments and replies should be addressed to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington D.C., 20554. The Report is available for public inspection in Room 518, 1919 M Street, N.W., Washington, D.C., 20554. Copies may be obtained from the International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

For further information, contact Mark C. Wolf, FCC Tariff Division, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

**PR Docket No. 86-404**

In the Matter of

Amendment of Part 90 Subparts M and S of the Commission's Rules — RM-5153

**ERRATUM**

**Released: December 17, 1986**

On November 28, 1986, the Commission released a Notice of Proposed Rule Making (FCC 86-447) in the above-captioned proceeding. Inadvertently, the Appendix containing the text of our proposed rules did not completely reflect several rule amendments that the Commission had promulgated in the *900 MHz Land Mobile Reserve Proceeding* (GEN Docket Nos. 84-1231, 84-1233, and 84-1234), released September 26, 1986 and published in the *Federal Register* on October 22, 1986 (51 Fed. Reg. 37,398-37,405).

In order to bring the proposed rules into conformance, we are making editorial amendments to paragraphs 8 and 9 of the Appendix. Rather than specifying the individual corrections to be made, we are setting forth below the full, correct text for paragraphs 8 and 9:

8. Section 90.617 is amended by revising paragraph (d), revising Table 4A, and adding a new Table 4C to read as follows:

***§ 90. 617 Frequencies in the 809. 750 - 816 / 854. 750 - 861 MHz and 896 - 901 / 935 - 940 MHz bands available for trunked or conventional system use in nonborder areas.***

* * * * *

(d) The channels listed in Tables 4A, 4B and 4C are available only for eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. This paragraph deals with the assignment of channels only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 160 km (100 miles) from the U.S./Canada border. See Section 90.619 for the assignment of SMR channels in these border areas. Channels 401-600 are available only for trunked operations. For stations located within 70 miles of Chicago, channels 401-600 will be assigned in groups as outlined in Table 4C.

Table 4A - SMR Category 806 - 821/851 - 866 MHz Band Channels (280 channels)

| Group No. | Channel Nos. |
|---|---|
| 228 | 228-268-308-348-388 |
| 401 | 401-441-481-521-561 |
| 402 | 402-442-482-522-562 |
| 403 | 403-443-483-523-563 |
| 404 | 404-444-484-524-564 |
| 405 | 405-445-485-525-565 |
| 406 | 406-446-486-526-566 |
| 407 | 407-447-487-527-567 |
| 408 | 408-448-488-528-568 |
| 409 | 409-449-489-529-569 |
| 410 | 410-450-490-530-570 |
| 411 | 411-451-491-531-571 |
| 412 | 412-452-492-532-572 |
| 413 | 413-453-493-533-573 |
| 414 | 414-454-494-534-574 |
| 415 | 415-455-495-535-575 |
| 416 | 416-456-496-536-576 |
| 417 | 417-457-497-537-577 |
| 418 | 418-458-498-538-578 |
| 419 | 419-459-499-539-579 |
| 420 | 420-460-500-540-580 |
| 421 | 421-461-501-541-581 |
| 422 | 422-462-502-542-582 |
| 423 | 423-463-503-543-583 |
| 424 | 424-464-504-544-584 |
| 425 | 425-465-505-545-585 |
| 426 | 426-466-506-546-586 |
| 427 | 427-467-507-547-587 |
| 428 | 428-468-508-548-588 |
| 429 | 429-469-509-549-589 |
| 430 | 430-470-510-550-590 |
| 431 | 431-471-511-551-591 |
| 432 | 432-472-512-552-592 |
| 433 | 433-473-513-553-593 |
| 434 | 434-474-514-554-594 |
| 435 | 435-475-515-555-595 |
| 436 | 436-476-516-556-596 |
| 437 | 437-477-517-557-597 |
| 438 | 438-478-518-558-598 |
| 439 | 439-479-519-559-599 |
| 440 | 440-480-520-560-600 |

* * * * *

Table 4C - SMR Category Chicago Plan 2, 3 Group No.

| Group No. | Channel Nos. |
|---|---|
| 401[1] | 401-410 |
| 411 | 411-447-483-519-555 |
| 412 | 412-448-484-520-556 |
| 413 | 413-449-485-521-557 |
| 414 | 414-450-486-522-558 |
| 415 | 415-451-487-523-559 |
| 416 | 416-452-488-524-560 |
| 417 | 417-453-489-525-561 |

| | |
|---|---|
| 418 | 418-454-490-526-562 |
| 419 | 419-455-491-527-563 |
| 420 | 420-456-492-528-564 |
| 421 | 421-457-493-529-565 |
| 422 | 422-458-494-530-566 |
| 423 | 423-459-495-531-567 |
| 424 | 424-460-496-532-568 |
| 425 | 425-461-497-533-569 |
| 426 | 426-462-498-534-570 |
| 427 | 427-463-499-535-571 |
| 428 | 428-464-500-536-572 |
| 429 | 429-465-501-537-573 |
| 430 | 430-466-502-538-574 |
| 431 | 431-467-503-539-575 |
| 432 | 432-468-504-540-576 |
| 433 | 433-469-505-541-577 |
| 434 | 434-470-506-542-578 |
| 435 | 435-471-507-543-579 |
| 436 | 436-472-508-544-580 |
| 437 | 437-473-509-545-581 |
| 438 | 438-474-510-546-582 |
| 439 | 439-475-511-547-583 |
| 440 | 440-476-512-548-584 |
| 441 | 441-477-513-549-585 |
| 442 | 442-478-514-550-586 |
| 443 | 443-479-515-551-587 |
| 444 | 444-480-516-552-588 |
| 445 | 445-481-517-553-589 |
| 446 | 446-482-518-554-590 |
| 591 | 591-592-593-594-595 |
| 596 | 596-597-598-599-600 |

**FOOTNOTES**

[1] Reserved for contiguous assignments or as a frequency pool for assignments to systems with odd number of channels.

[2] These channels will be authorized only in the area encompassed by a 70 mile radius centered at 41°52'28" N, 87°38'22" W.

[3] All stations located beyond the 70 mile distance authorized on or before August 16, 1982 to use these channels may continue to do so. Stations beyond the 70 mile distance authorized after August 16, 1982 shall employ channels listed in Tables 4A and 4B subject to the provisions of §90.621(b) or (c) as applicable.

* * * * *

9. Section 90.631 is amended by revising the section heading to read as follows, deleting paragraphs (a) and (b), and redesignating paragraph (c) as paragraph (a), paragraph (d) as paragraph (b), paragraph (e) as paragraph (c), and paragraph (f) as paragraph (d).

**§ *90. 631 Trunked systems construction and* authorization requirements.**

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 85-204**

In the Matter of

Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 3, 1986** **Released: October 28, 1986***

By the Chief, Common Carrier Bureau:

1. On January 30, 1986, the Commission adopted an order on the implementation and scope of its uniform settlements policy (*USP Order* ).[1] In particular, the *USP Order* established a new requirement that transit traffic operating agreements establish a 50-50 division of the accounting rate and an equal sharing of the transit fee. The *USP Order* also established a transition period of 180 days from the release of the *USP Order* to allow carriers to bring their arrangements for indirect traffic into conformity with this new requirement or to file waiver requests showing good cause for non-uniformity.

2. On March 10, 1986, Graphnet, Inc. filed a Motion for Stay of the filing requirements regarding transit traffic . In support of its motion for stay, Graphnet argued: (1) that the public interest favors a stay; (2) that the Commission is likely, upon reconsideration, to remove this requirement; (3) that Graphnet and other carriers would suffer irreparable harm in the absence of a stay; and (4) that a stay would not cause substantial injury to others. Moreover, the Commission received six petitions for reconsideration which, with their associated pleadings, raised the issues Graphnet raised in its motion.

3. On June 27, 1986, the Bureau released an order extending the filing deadline for transit waiver requests to October 30, 1986. In this order we extend the filing deadline for transit waiver requests to December 30, 1986. This action should provide the Commission with time in which to resolve the issues raised on reconsideration, does not prejudge the Commission's final determination on such issues, and removes any burden on the carriers during this interim period.

4. Accordingly, on delegated authority, IT IS ORDERED that the filing date for waiver requests for transit traffic regarding divisions of tolls, as provided in the *USP Order*, IS EXTENDED to December 30, 1986.[2]

5. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Order to be printed in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

* Note: This item, although publicly released on the date indicated, was not included in the appropiate volume of the Federal Communications Commission Commission Record.

**FOOTNOTES**

[1] Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, CC Docket 85-204, FCC86-30, 51 Fed. Reg. 4736 (February 7, 1986).

[2] This order is promulgated under delegated authority pursuant to Sections 0.201(a) and 1.101 of the Commissions rules, 47 U.S.C. §§0.201(a) and 1.101.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Sections 0.416, 0.445, and 1.14 of the Commission's Rules

**ERRATUM**

**Released: December 17, 1986**

On December 9, 1986 the Commission released an Order (FCC 86-516) in the above-captioned proceeding. The following words are added to 0.445 to clarify this rule for use by the public.

1. In 0.445(d) add the words "FCC Reports" immediately following the words "FCC Record" in the first and second sentences.

2. In 0.445(e) add the words "FCC Reports" immediately following the words "FCC Record" in the first sentence.

3. In 0.445(f) add the words "FCC Reports" immediately following the words "FCC Record" in the first sentence.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Request to Defer Operating
Authority to

BELL ATLANTIC
MOBILE SYSTEMS OF
PHILADELPHIA, INC.

File No. 10003-CL-L-87

For Wireline Cellular Authorization
in Atlantic City

**MEMORANDUM OPINION AND ORDER**

**Adopted December 12, 1986; Released December 18, 1986**

By the Common Carrier Bureau:

1. Before us is a petition filed by American Cellular Network Corporation (AMCELL) to defer grant of the above-captioned license to cover application filed by Bell Atlantic Mobile Systems of Philadelphia (BAMS). AMCELL filed an opposition to the Petition.

2. AMCELL argues that the Atlantic City system "is apparently part of the Philadelphia supersystem" which includes seven other MSAs. As a result, AMCELL contends, that the "supersystem" would include three separate LATAs. As BAMS is prohibited from offering inter-LATA services under the Modified Final Judgment (MFJ) in *U.S. v. Western Electric* (Civil Action No. 82-0192), AMCELL requests deferral of the license to cover application until a waiver is obtained by BAMS.

3. In response, BAMS contends the petition should be summarily dismissed because AMCELL does not even raise the issues which the Commission has established for evaluating petitions to defer. According to BAMS, the petitioner must "make a specific and compelling showing, using market-specific data, that there will be a demonstrable impact of the headstart upon competition in the relevant market." *Colorado Springs SMSA Limited Partnership*, Mimeo No. 2655, para.5 (released February 19, 1986). *See also Ameritech Mobile Communications, Inc.*, FCC 85-301, para.11 n.9 (released June 14, 1985), *recon. den.*, FCC 86-281 (released June 6, 1986). In addition, BAMS claims that the Commission has already determined that it will not defer a license application where an MFJ waiver had not yet been obtained. *New York SMSA Limited Partnership*, 58 Rad. Reg.2d (P&F) 2d 525, 530 (1985). Finally, BAMS argues that AMCELL raised these same arguments without success before when BAMS received its construction permit. *Bell Atlantic Mobile Systems* of Philadelphia, Inc., 61 Rad. Reg.2d (P&F) 2d 141 (1986) (Bell Atlantic).

4. We will deny AMCELL's petition to defer grant of BAMS' license to cover. AMCELL has made no showing that it will be harmed in any manner by the initiation of cellular service by AMCELL. Also, AMCELL makes its claims without reference to the fact that the Commission specifically rejected these arguments before.[1] AMCELL has not presented any evidence or arguments that would lead us to a conclusion different from the one we reached in Bell Atlantic, *supra*.

5. Accordingly, IT IS ORDERED, That the Petition to Defer operating authority to the Bell Atlantic Mobile Systems of Philadelphia, Inc. filed by American Cellular Network Corporation IS DENIED.

6. IT IS FURTHER ORDERED, That the Application of Bell Atlantic Mobile Systems of Philadelphia, Inc., File Number 10003-CL-L-87, IS GRANTED.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective on its adoption date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 may be filed within 30 days of the date of public notice of this order. See Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

**FOOTNOTES**

[1] "AMCELL's claim that the Commission cannot lawfully grant an application .prior to waiver of the MFJ, is contrary to clearly articulated Commission policy " *Bell Atlantic, supra* at para.4.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

APPLETON-OSHKOSH-
NEENAH MSA File No. 10004-CL-L-87
LIMITED PARTNERSHIP

For licenses to cover
Construction Permits to
operate on frequency
Block B in
Domestic Cellular Radio
Telecommunications Service to
serve Appleton-Oshkosh-Neenah
Wisconsin
Metropolitan Statistical Area(MSA)

## MEMORANDUM OPINION AND ORDER

**Adopted December 12, 1986; Released December 18, 1986**

By the Common Carrier Bureau:

1. Merrimack Telecommunications Corporation (MTC) filed a petition to defer the issuance of a license to the Appleton-Oshkosh-Neenah MSA Limited Partnership (Partnerhsip). The Partnership filed an application for a radio station license to cover its construction permit on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service in the Appleton-Oshkosh-Neenah, Wisconsin MSA. MTC is the permittee holding the non-wireline Block A construction permit for this MSA. Responsive pleadings have been filed.

2. MTC alleges that it has obtained an NXX code through the Wisconsin Bell Telephone Co. for use on its own cellular system. To minimize any headstart advantage that will accrue to the Partnership, MTC states it is contemplating becoming a reseller on the Partnership's facility and seeks a contractual arrangement with the Partnership to place its own numbers from its NXX code on the Partnership's switch. It adds that the Partnership's tariff filed with the Public Service Commission of Wisconsin permits the Partnership "the right to assign, designate or change such numbers" whenever the Partnership deems such change "reasonably necessary". MTC requests that the Commission defer acting on the Partnership's license request pending action on its request.

## DISCUSSION

3. Upon review of the pleadings before us, we will deny MTC's petition. The Partnership in its opposition has stated that it has no objection to the placement of MTC's numbers on its system and states it will promptly amend its proposed tariff accordingly. Based upon this representation there appears to be no outstanding controversy between the parties.[1]

4. Based upon the Partnership's representations we conclude that it has acted consistent with Commission policy.[2] The Commission adopted resale as a safeguard to promote competition between the wireline and non-wireline operators authorized to serve the same MSA, and thereby prohibited restrictions on resale. To accomplish this the Commission required the wireline licensee to "provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as [to] its own distribution arm." *Cellular Communications System*, 86 FCC 2d 469, 510-11 (1981).[3]

5. We conclude that the Partnership's is legally and technically qualified to hold a license to provide cellular service to the public in this MSA. Our decision turns on the clear and significant benefit to the public that we envision from the rapid introduction of this new service. We therefore conclude that the public should be afforded the opportunity to use this cellular service without additional delay.

## ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED That the Petition For Deferral of Operating Authority filed by the Merrimack Telecommunications Corporation IS DENIED.

7. IT IS FURTHER ORDERED That the application of Appleton-Oshkosh-Neenah MSA Limited Partnership for a covering license for the Appleton-Oshkosh-Neenah MSA, File No. 10005-CL-L-87 IS GRANTED.

8. This Order is issued under Section 0.291 of the Commission's Rules and is effective on its adoption date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this Order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

## FOOTNOTES

[1] Based upon the Partnership's unrefuted representations it appears that this controversy could well have been avoided had the parties met to discuss MTC's proposal well before the deadline for filing a petition for deferral. We would urge the parties to meet with one another and to provide ample time to discuss their views prior to filing substantive pleadings with the Commission.

[2] Moreover, the Commission has concluded that the public interest is best served by initiating service as soon as possible. *See Cellular Communications System*, 86 FCC 2d 469, 491 n. 57(1981), *modified on recons.*, 89 FCC 2d 58, 72, 74-75 (1982). The Commission recognized one limited exception, where a non-wireline applicant can demonstrate an "early entry into

the market would not be in the public interest" however, that "unsupported allegations of harm will not be sufficient to delay service to the public" . *Id.*

[3] We observe that MTC received its construction permit one day before a permit was granted to the wireline.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RADIOFONE,
INC. File No. 21719-CL-P-136-A-86

For authority to construct a cellular) system in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in the Lorain-Elyria, Ohio Metropolitan Statistical Area (MSA).

## MEMORANDUM OPINION AND ORDER

**Adopted December 10, 1986; Released December 18, 1986**

By the Common Carrier Bureau:

1. North Coast Communications (NCC) has filed a petition to deny the above-referenced application of Radiofone, Inc.[1] Radiofone filed a reply to the petition. In its petition, NCC argues that Radiofone is not qualified to be a Commission licensee because it has failed to meet basic application requirements.

2. NCC claims that Radiofone failed to notify the Federal Aviation Administration (FAA) of its intent to increase the height of an existing antenna structure from 153 feet above ground level (AGL) to 161 feet AGL as NCC maintains is required by Part 77 of the FAA rules. NCC states that this defect is a clear violation of FCC and FAA requirements and constitutes a failure to comply with the Commission's standards for applications in markets below the largest 120.

3. Radiofone responds that under Part 77 of the FAA regulations, Part 17 of this Commission's rules, and FAA Advisory Circular 70/7460-2G, the alteration of an existing structure as proposed by Radiofone does not require FAA notification. In support of this statement, Radiofone submitted the affidavit of a professional engineer stating that the structure is more than 20,000 feet from the nearest landing facility; that the FAA previously had given clearance for an antenna height of 325 feet AGL and 990 feet above mean sea level; and that the structure is not in an instrument approach area as defined in FAA standards governing instrument approach procedures. Attached to the affidavit was an FAA aeronautical study concluding that, given the facts stated above, no notification to the FAA was necessary.

4. Based on the foregoing, and after careful review of the application and associated pleadings, we find that Radiofone is correct in its interpretation of our rules and those of the FAA. No notification to the FAA was required in this case and Radiofone is legally, technically and otherwise qualified to be a Commission licensee.

5. Accordingly, IT IS ORDERED, that the application filed by Radiofone, Inc., File No. 21719-CL-P-136-A-86, IS GRANTED. The authorization does not include the right to any interference protection in any areas outside the Lorain-Elyria, Ohio MSA and is conditioned upon Radiofone coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

6. IT IS FURTHER ORDERED, that the petition to deny filed by North Coast Communications IS DENIED.

7. IT IS FURTHER ORDERED, that all other non-wireline applications in this market ARE HEREBY DISMISSED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

### FOOTNOTES

[1] Radiofone was chosen as the tentative selectee in the lottery for the above-captioned MSA in the May 5, 1986 cellular lottery.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM DOCKET NO. 86-458**

Melvin Jones d/b/a JONECO BROADCASTING — File No. BPCT-860623KE

TOWER BROADCASTING CORPORATION — File No. BPCT-860820KK

For Construction Permit for a New TV Station Sonora, Texas

**ERRATUM**

**Released: December 17, 1986**

The Hearing Designation Order in the above captioned proceeding (DA 86-276), adopted November 25, 1986 and released December 11, 1986, is corrected to show the Docket No. as MM Docket No. 86-458 not 86-450.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

GENERAL TELEPHONE COMPANY OF OF ILLINOIS — AAD 6-1541

ILLINOIS COMMERCE COMMISSION — AAD 6-1557

Petitions for Waiver of the January 1, 1987 Deadline for Detariffing the Installation and Maintenance of Inside Wiring

## MEMORANDUM OPINION AND ORDER

**Adopted: December 15, 1986 Released: December 18, 1986**

By the Chief, Common Carrier Bureau:

### I. INTRODUCTION

1. In the *Second Report and Order* in Docket No. 79-105,[1] the Commission determined that the installation and maintenance of inside wiring should be preemptively detariffed as of January 1, 1987. The subject petitions seek deferrals of that deadline. The General Telephone Company of Illinois ("GTI"), by petition filed September 19, 1986, asks that it be allowed to install and maintain simple inside wiring under tariff until April 1, 1987, and to maintain complex inside wiring under tariff until December 31, 1987. The Illinois Commerce Commission ("Illinois"), by petition filed November 18, 1986, seeks a one-year waiver of the January 1, 1987 detariffing deadline on behalf of "Illinois telecommunications carriers."[2] The GTI petition was placed on public notice on October 21, 1986. No Comments on the petitions were filed.

### II. THE PETITIONS

#### A. GTI's Petition

2. To support its waiver request, GTI states that the detariffing deadlines it proposes for inside wiring are the deadlines Illinois has set for detariffing GTI's customer premises equipment ("CPE"). GTI asserts that concurrent detariffing of inside wiring and CPE would decrease the customer confusion and administrative costs associated with detariffing. GTI states that those decreases would occur because its inside wiring maintenance charges presently are bundled with local monthly service charges for single line customers and with CPE lease rates for other customers. Absent concurrent detariffing of inside wiring and CPE, GTI assertedly would need to: (a) file new tariffs unbundling inside wiring charges, (b) provide separate customer notifications for inside wiring and CPE detariffing, and (c) implement expensive and complicated interim time reporting methods for all its maintenance and service personnel.

3. GTI represents that it will not attempt to recover any costs associated with the continued tariffing of inside wiring beyond December 31, 1986 from the National Exchange Carrier Association ("NECA") pool in the event its waiver request is granted. Thus, according to GTI, deferring the detariffing of inside wiring until the dates scheduled for CPE detariffing would not undermine the Commission's policy that the cost-causative customer should bear all inside wiring costs. In addition, GTI states that its circumstances differ from those of the Bell Operating Companies ("BOCs") which detariffed CPE upon divestiture from AT&T in 1984 and from those independent telephone companies which will have detariffed CPE by January 1, 1987.

#### B. Illinois' Petition

4. Illinois' request for a one-year waiver of the inside wiring detariffing deadline is also based on an alleged need for concurrent detariffing of inside wiring and CPE. Illinois asserts that it has an ongoing proceeding to develop procedures for detariffing inside wiring. During the course of that proceeding, Illinois determined that local exchange carriers ("LECs) subject to its jurisdiction will require additional time to detariff inside wiring in an orderly manner.[3] Illinois states that its CPE detariffing plan will allow Independents subject to its jurisdiction to offer CPE under tariff after January 1, 1987 and that those companies should have the option of offering inside wiring services under tariff until such time as the companies' CPE operations are detariffed.[4] According to Illinois, all CPE operations in Illinois will be detariffed by December 31, 1987. Illinois Bell's CPE operations, of course, were detariffed during 1984; and Illinois has adopted procedures under which that company will have detariffed inside wiring installation and maintenance by January 1, 1987.

5. Illinois did not identify and explain precisely what actions it would take pursuant to a grant of its waiver request herein. However, Illinois states that all LECs operating in the state of Illinois are parties to Illinois' ongoing inside wiring detariffing proceeding,[5] and it appears that Illinois wishes to give Independents subject to its jurisdiction the option of continuing to provide inside wiring installation and maintenance services under intrastate tariff until the time when those carriers' embedded CPE will be detariffed.[6] Our understanding is that Illinois does not propose to *require* any carrier to provide inside wiring services under tariff after December 31, 1986.

### III. DISCUSSION

6. Subsequent to the filing of the subject petitions, the Commission affirmed its requirement that inside wiring installation and maintenance be preemptively deregulated as of January 1, 1987.[7] The Commission indicated that the deadline would be waived only upon a showing that adherence thereto in the petitioner's particular situation would not serve the public interest and that the proposed waiver would not undermine that policies the deadline serves.[8] The Commission determined, moreover, that it would defer the effectiveness of its preemption of state regulation of the installation and maintenance of inside wiring if such a deferral were necessary to accommodate

an overriding public interest objective such as the need to avoid a significant adverse impact upon consumers.[9] It made clear that any such deferral would be subject to the conditions that LECs offering inside wiring services under intrastate tariffs after December 31, 1986 must account for inside wiring costs incurred after that date in accordance with FCC accounting rules and exclude all such costs from interstate revenue requirement and interstate pooling distribution computations.[10]

7. We believe that GTI and Illinois have shown that it would serve the public interest to defer the effectiveness of our preemption of state regulation of inside wiring installation and maintenance services performed by those Illinois carriers which will continue to offer CPE under tariff after January 1, 1987. In the *Third Report and Order* in Docket 81-893,[11] the Commission gave the states until December 31, 1987 to complete the process of detariffing embedded CPE provided by Independents. It did so to provide the states with sufficient time to establish detariffing plans meeting the particular circumstances of Independents subject to their jurisdiction. In the exercise of its jurisdiction, Illinois has adopted a detariffing plan for embedded CPE which is fully consistent with FCC requirements and which provides for the completion of that detariffing process by December 31, 1987. We do not wish to force Illinois to choose between altering that plan and having different detariffing deadlines for CPE and inside wiring.

8. We find it appropriate to permit Independents operating in the state of Illinois to detariff inside wiring and embedded CPE concurrently. Although deferring the deadline for the preemptive detariffing of inside wiring will keep Illinois consumers from immediately realizing the full benefits of our deregulation of inside wiring installation and maintenance, the benefits to be derived from permitting the concurrent detariffing of inside wiring and embedded CPE in Illinois outweigh the costs of the limited deferral. Therefore, we will grant a waiver to defer the effectiveness of the preemption of state regulation of inside wiring installation and maintenance services performed by Independent telephone companies operating in the State of Illinois until such time as that state detariffs the CPE operations of those companies. The deferral will end no later than December 31, 1987. It will be subject to the conditions that any Independent which continues to offer inside wiring services under intrastate tariffs after December 31, 1986 shall account for inside wiring costs incurred after that date in accordance with the FCC's accounting rules and shall exclude all such costs from interstate revenue requirement and interstate pooling distribution computations. In accordance with our understanding regarding the relief Illinois seeks,[12] Illinois may not require any carrier to provide inside wiring under tariff after December 31, 1986.[13]

## IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the petition for waiver filed September 19, 1986, by General Telephone Company of Illinois IS GRANTED, subject to the conditions stated above.

10. IT IS FURTHER ORDERED, that the petition for waiver filed November 18, 1986, by the Illinois Commerce Commission IS GRANTED to the extent indicated above and subject to the conditions stated above, IS DISMISSED to the extent indicated in footnote 2 above, and otherwise IS DENIED.

11. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

## FOOTNOTES

[1] Detariffing the Installation and Maintenance of Inside Wiring, Docket 79-105, 51 Fed. Reg. 8498 (Mar. 12, 1986)(hereinafter *Second Report and Order* ), *recons. in part, Memorandum Opinion and Order*, Docket 79-105, FCC 86-513 (released Nov. 21, 1986) (hereinafter *Inside Wiring Reconsideration Order* ).

[2] Illinois Petition at 4. Illinois also seeks a waiver of the deadline established in the *Second Report and Order* for relinquishing claims to ownership of "expensed" inside wiring. The Commission has eliminated the relinquishment requirement. *See Inside Wiring Reconsideration Order, supra* at ¶34-35. Accordingly, that part of Illinois' petition is moot. Id. at n.79.

[3] *Interim Order*, Docket No. 86-0287, Procedure for Implementing the detariffing of the installation and maintenance of simple as well as complex inside wiring (Ill. Commerce Comm'n, Oct. 16, 1986).

[4] Id. at 2-3.

[5] Id. at 1.

[6] Id. at 3.

[7] *Inside Wiring Reconsideration Order, supra* at ¶13-22.

[8] Id. at ¶39. *Accord WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[9] *Inside Wiring Reconsideration Order, supra* at ¶20.

[10] See id. at ¶21.

[11] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), 99 FCC 2d 354, 367 (1984).

[12] *See* ¶5, *supra*.

[13] Normally, the Commission does not waive its rules or policies except upon the request of the carrier affected thereby. *See Applied Spectrum Technologies, Inc.*, ENF 85-6, Mimeo No. 5532, at n.21 (released July 3, 1985). In view of the important public interest considerations Illinois raises, however, we have addressed the merits of its petition notwithstanding the absence of specific concurrence therein by the independent LECs which may be affected by our grant of that petition.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIDYEAR 1986 ACCCESS
TARIFF FILINGS

Petitions for Reconsideration
of May 20 Order

## MEMORANDUM OPINION AND ORDER

**Adopted: December 2, 1986 Released: December 19, 1986**

By the Commission:

### I. INTRODUCTION

1. On April 1, 1986, the local exchange carriers (or "LECs") filed revised access charge tariffs effective June 1, 1986, in order to reflect the increase in the subscriber line charge from $1 to $2,[1] the direct assignment of WATS access lines for jurisdictional separations purposes,[2] the revision of the separations apportionment of local commercial expenses,[3] and the revisions in access charge rules that we adopted to reflect those separations changes.[4] We had previously revised our access charge rules to eliminate the requirement that all LECs make comprehensive access filing to be effective June 1, 1986.[5] We had decided that the June 1 filing could be limited to changes in access charge tariffs that were necessary to implement the separations and access changes that we had ordered.

2. As we have explained in the Order we adopted today denying reconsideration of the *WATS Direct Assignment Order*, that Order did not change the separations classification of access lines that the OCCs[6] used to provide services that are competitive with the AT&T WATS service. Nevertheless, in their April filings, many of the LECs decided to add new tariff provisions restricting the use of special access lines for the provision of such OCC services. Those carriers apparently decided to impose new restrictions because they anticipated that our decisions relating to WATS would create an incentive for OCCs to change the access arrangements they used for services that compete with AT&T WATS. The OCCs had traditionally used a LEC special access line from the end user premises to the OCC switch and performed all necessary blocking and screening in their own switches. Our decisions created an incentive for them to substitute a special access line to a LEC switch that functions as a WATS serving office, LEC switching at the serving offices, and a transport trunk from the WATS serving office to the OCC switch. The LEC tariff revisions restricted the use of special access lines in such configurations by both OCCs and AT&T and were apparently intended to describe blocking and screening that would be provided in the WATS serving office with or without an interexchange carrier (IXC) request. OCCs expressed concern that at least some of the LEC tariff provisions might be construed to prevent OCCs from using that combination of access services to offer a service that differed from the AT&T WATS services.

3. In its *May 20 Order* [7] the Common Carrier Bureau rejected certain provisions[8] in the midyear 1986 access tariff revisions filed by the National Exchange Carrier Association (NECA), the Bell Operating Companies (BOCs), and other LECs which proposed to establish separate rates, separate rate structures and separate use restrictions applicable to WATS closed ends.[9] Carriers proposing such rates were directed to correct them by applying integrated special access rate elements to WALs[10] and WALEs[11] and corresponding elements in other special access loops, to be effective June 1, 1986. In addition, the LECs were directed to eliminate all discriminatory restrictions applying only to WATS access lines and not to all voice grade special access lines. *Id.* Various BOCs filed petitions requesting waiver or stay of the effectiveness of this requirement, alleging that a multitude of provisioning and technical problems would prevent timely implementation of tariff changes required for WATS access by the Order. In response to these requests, in the *May 30 Order* the Bureau granted all carriers a waiver of the standard ordering interval until September 1, 1986.[12] Six petitions requesting reconsideration or clarification of the *May 20 Order* have been filed.[13] The Common Carrier Bureau has referred these petitions to us for decision.

### II. CONTENTIONS; DISCUSSION

4. The petitioners present four arguments in support of their requests for reconsideration or clarification: (1) the Order constitutes a rulemaking and therefore exceeds the scope of the Bureau's authority; (2) the elimination of mandatory blocking and screening and directionality[14] alters the definition of a WATS access line; (3) the LECs are unable to provide unrestricted WATS service at the present time; and (4) the Order is inconsistent with the *WATS Access Order* and the *WATS Direct Assignment Order*.

#### A. Procedural Issues

##### 1. Contentions of the Parties

5. Southwestern and BellSouth allege that the requirement set forth in the *May 20 Order* that direct and indirect restrictions (*e.g.*, blocking, screening and directionality) regarding the use of WATS access lines be removed is inconsistent with previous Commission and Joint Board decisions relating to jurisdictional separations and access charge treatment of WALs, and thus exceeds the Bureau's delegated authority.[15] BellSouth and Cincinnati Bell argue that the requirement represents a policy change which can be effectuated only by the Commission after a notice and comment proceeding. Inasmuch as Section 0.291(h) of this Commission's Rules[16] denies the Bureau authority to conduct notice and comment rulemaking proceedings, they argue, the Bureau exceeded its delegated authority in setting forth a policy change in the *May 20 Order*.[17] Cincinnati Bell further argues that the effect of the Order is to prescribe a new tariff provision for WATS service. It contends that, pursuant to Section 205 of the Communications Act, a hearing is required to enter such a prescription. *Id.* at 2.

6. ALC and MCI contest petitioners' procedural challenges to the *May 20 Order*. They deny that the Order represented either a rulemaking or a policy change. Rather, ALC maintains, the Order required "the elimination of a patent tariff discrimination requiring the removal of tariff provisions which unjustly and unreasonably bundled a series of so-called "optional" features and restrictions which made WATS virtually useless for many interexchange carriers."[18] ALC also argues that the suggestion that the LECs had no opportunity to comment is "specious." *Id.* ALC states that both ALC and MCI petitioned this Commission to remove these restrictions in their April 26 petitions on the Midyear Access Tariffs and that the LECs commented at that time on the proposal to eliminate the restrictions. *Id.*

**2. Discussion**

7. Section 0.291 of this Commission's Rules[19] delegates to the Chief, Common Carrier Bureau, authority to perform all functions set forth in Section 0.91, subject to certain exceptions that are not relevant to this proceeding. Section 0.91 of the Rules states, in pertinent part, that:

> The Common Carrier Bureau develops, recommends and administers policies and programs for the regulation of services, facilities, rates and practices of entities . . . which furnish interstate or foreign communications services for hire . . . : The Bureau also performs the following specific functions:
>
> a) Advises and makes recommendations to the Commission, or acts for the Commission in matters pertaining to the regulation and licensing of communications common carriers and ancillary operations. This includes: adjudicatory and rulemaking proceedings, including rate and service investigations, and determinations regarding lawfulness of carrier tariffs . . . . The broad delegation of authority to the Bureau set forth under Section 0.91[20] explicitly includes responsibility for determinations regarding the lawfulness of carrier tariffs. Contrary to the assertions of petitioners, the action taken in the *May 20 Order* did not alter in any way this Commission's Rules. There is no Commission Rule which requires restrictions on the special access used to provide WATS or WATS-like services and the petitioners have cited none. The Communications Act affirmatively requires reasonable rates and regulations.[21] The Bureau found that particular tariff provisions restricting interexchange carriers' ability to use access services that LECs offer represented unreasonable practices and rejected the tariffs. The rejection of an unlawful tariff is not a rulemaking contemplated by Section 0.291(h) and is within the scope of the Bureau's delegated authority.

8. The contention that the Bureau's action represents a change in policy is not persuasive. When we adopted our access charge plan and created the various access elements we envisioned that IXCs would be able to combine standard access elements to create interexchange services of their own choosing. The imposition of LEC-initiated restrictions on the use of access services is not consistent with the dynamic, competitive environment this Commission has been endeavoring to create. The Bureau's decision to reject such restrictions merely implemented the policy we have already established.

9. Nor do we find any basis for Cincinnati Bell's contention that the *May 20 Order* constituted a prescription under Section 205(a). The Bureau did not prescribe rates or practices. Rather, it directed the carriers to revise their tariffs to eliminate patently unlawful tariff provisions. Such an action is not equivalent to a prescription.[22] Cincinnati Bell cites no authority for the contrary proposition. We therefore reject the argument that a hearing was required under Section 205(a) prior to requiring the elimination of unlawful provisions in the midyear access tariff filings.

10. The *May 20 Order* might be viewed as a prescription if the Bureau had ordered the LECs to refrain from ever imposing any unrequested blocking and screening instead of ordering the LECs to remove the vague, overly restrictive and patently unreasonable provisions in the tariffs that had been filed. We do not construe the Bureau order as foreclosing unambiguous, carefully tailored restrictions that have been adequately justified. The *May 20 Order* directed the LECs to remove "discriminatory" restrictions and the *May 30 Order* expressly stated that the *May 20 Order* does not preempt restrictions imposed by state govenments.

**B. The Nature of WATS Service**

**1. Contentions of the Parties**

11. Petitioners argue that the *May 20 Order* effectively mandates a change in the nature of WATS service.[23] US West states that INWATS and OUTWATS are distinctive services and that there "is no two-way WATS service." It asserts that mandatory removal of the directionality restrictions on closed end WATS would contradict the essential nature of WATS service itself. *Id.* at 3. BellSouth contends that the Bureau has "fundamentally altered the definition of a WATS access line."[24] Petitioners argue that, in its decisions in CC Docket 86-1, this Commission relied upon the fact that all WATS access lines are dedicated entirely to either interstate or intrastate service. They also maintain that mandatory blocking and screening are necessary to enforce the intrastate or interstate nature of the service.[25]

12. Pacific requests clarification that WATS access line service is available for use only with FGC and FGD.[26] According to Pacific, FGA and FGB services do not record the called number. If used with WATS, Pacific asserts, this failure to record the called number would create two difficulties: Carrier Common Line (CCL) revenues would not be billed accurately by jurisdiction and might cause a CCL revenue shortfall in one jurisdiction; and since the LEC cannot record the called number, it would be impossible to determine the intraLATA calls carried over FGA and FGB. *Id.*

13. Pacific also requests clarification that the closed end of WATS is to be used for originating WATS calls and terminating 800 service calls and not originating or terminating MTS traffic. *Id.* at 2. In the event that this Commission intends to allow MTS traffic over the closed end of WATS or to allow WATS access line service to be used with FGA or FGB switched services, Pacific requests reconsideration, contending that: (1) permitting MTS traffic on WALs would create an inconsistency between WALs and other special access services; and (2) treating MTS minutes, which are normally subject to CCL charges, as closed end WATS minutes could cause a significant migration of calls from common lines to

WATS. Such a shift would result in a CCL revenue shortfall and could require an increase in the CCL charge. *Id.* at 3.

14. Opponents dispute petitioners' contention that the required removal of blocking, screening and directionality forces the LECs to provide a new service.[27] MCI asserts that throughout the course of the access charge proceeding a WATS service has been recognized as nothing more than a volume-discounted long distance offering provided by either AT&T or its competitors. MCI Opposition at 4. According to MCI, WATS services offered by Other Common Carriers (OCCs) have traditionally been provided with combined interstate and intrastate calling capabilities. Any blocking and screening by these services has been provided by the OCC in its switches. *Id.* at 4-5. ALC suggests that the LECs' assertion that they have been required to provide a new service "strains credulity." ALC Opposition at 11.

15. US Sprint vigorously challenges petitioners' assertions that use restrictions are necessary for jurisdictional purposes.[28] It argues that

> the fact that the LECs are in the business of providing access to the interexchange carriers does not give them the right to "police" the IXCs' use of those lines to ensure that those lines are kept "jurisdictionally pure" or that the IXCs are not violating any intrastate regulation. Rather, it is the IXCs' responsibility to design and offer its services in a manner which is consistent with and does not violate regulatory requirements by this Commission and the states.

*Id.* at 4-5.

16. In its Reply Comments, US West agrees with US Sprint that it is unnecessary for exchange carriers to use blocking and screening to "police" interexchange carrier (IXC) compliance with state regulatory requirements. If state restrictions exist, US West states, IXCs need not necessarily purchase screening and blocking from the LEC. They should be free to provide their own screening and blocking as required to comply with state requirements or to meet the IXCs' own marketing strategies.[29]

**2. Discussion**

17. We are not persuaded by claims that the use of some special access lines must be restricted to preserve the nature of WATS. The services that AT&T chose to create at some point in the past do not have any special status preventing the OCCs or AT&T from offering something different in the future. For example, the assertion that WATS must be only one-way and either interstate or intrastate is based upon the premise that WATS service must retain the configuration designed historically for AT&T. That configuration, however, is not compelled by any legal constraint or regulatory policy and, indeed, any such constraint would be antithetical to the policies articulated in this Commission's recent Orders. For example, we have required carriers to offer dedicated special access on an unbundled basis[30] and have directed them to eliminate tariff provisions which restrict a customer's use of voice grade categories to specified purposes.[31] Our goal in taking these actions was to eliminate unnecessary complexity and duplication and to reduce the potential for discrimination created by segmenting the market into separate service classifications. *Id.* Our intent has been to allow the OCCs to utilize the network in ways which meet the needs of their customers and thereby to encourage a more efficient use of the network. In the *May 20 Order*, the Bureau properly rejected as unlawful tariff provisions which, in violation of the intent and purpose of the access charge rules, attempted to impose on other carriers service characteristics designed for AT&T.

18. Petitioners' assertions that the *May 20 Order* conflicts with Commission decisions relating to the separations and access treatment of WATS lines are also incorrect. We have concluded in our companion opinion denying reconsideration of the *WATS Direct Assignment Order* that our observations with respect to the jurisdictional purity of WATS lines related to the AT&T and LEC WATS lines that have not been subject to direct assignment in the past. We did not find that OCCs have maintained jurisdictional purity in the past and did not conclude that OCCs should be required to do so in the future.

19. We do not, however, foreclose the possibility that restrictions might be imposed to implement state commission policies.[32] For example, if a state prohibits the provision of some or all intrastate services by a particular carrier, a LEC could reasonably block such traffic even if the OCC has not requested such a blocking service. The *May 20 Order* also would not prevent a state from requiring that intrastate WATS services only be provided over jurisdictionally dedicated access lines. We would, of course, expect that the restrictions would be clearly stated in the LEC's interstate tariff and adequately justified in materials that are filed to support the tariff.

20. We also agree with the Bureau's conclusion that restrictions should not be imposed that create discrimination among special access lines. Any unreasonable discrimination would conflict with the requirement of Section 202 of the Communications Act, 47 U.S.C. § 202, and the intent of our decisions to include WATS lines in the special access category for purposes of the access charge rules. This analysis provides the response to the question posed by Pacific regarding restrictions on the use of WATS access lines for MTS traffic. No such restrictions may be imposed on WATS lines that are not also imposed on other special access lines. Prior to our decision in the *WATS Access Order*, OCC WATS-type services had dedicated or special access connections. We are not aware of any tariff or other restrictions which would have prevented the use of such lines for MTS-type traffic. In addition, we note that AT&T's Megacom offering might be characterized as an MTS-type service which uses special access on the originating end. Imposition of Pacific's suggested limitation would make it impossible for AT&T to offer Megacom since it does not employ common lines on the orginating end.[33] We have already denied petitions to reject the Megacom tariff that were based on similar arguments.[34]

21. Pacific's concerns regarding the use of unrestricted WATS access lines to access FGA connections appear to have been substantially resolved. Pacific reports, in connection with its proposal to provide interim 800 Service, that by November 15, 1986 it will have reconfigured its billing system to allow it to record the called number and to credit the CCL charge properly.[35] Pacific therefore will not restrict the use of WATS access lines with FGA or FGB in the terminating direction.[36] Despite the apparent resolution of Pacific's problems, clarification of the LECs' obligations in this regard is still relevant. Several recently filed tariff revisions provide for WATS service only in

association with FGC and FGD.[37] Carriers have also informed the Bureau staff that they interpret the *May 20 Order* to require that WATS access lines need only be offered in connection with FGC and FGD. We therefore take this occasion to correct that misinterpretation.

22. The *May 20 Order* properly concluded that established Commission policies require that the dedicated portion of WATS direct access be provided on the same basis as other voice grade special access lines as part of an integrated structure without separate rates or elements, and without direct or indirect restrictions on the use of those lines.[38] Proposals to limit use of WATS access lines to FGC and FGD violate such policies. Carriers may not refuse to provide WATS access lines in connection with FGA and FGB services.[39] We recognize, however, that proper billing for such lines will require, in some instances, modifications to LEC accounting procedures in order to recognize WATS calls and to credit CCL charges for such calls. Many LECs will require time, as did Pacific, in which to develop such procedures. In the interim they will be unable to identify and credit WATS calls. Further, if FGA calls are not now automatically recorded in particular central offices the costs of adding automatic message recording equipment in those offices would be significant. We believe that such expenditures would prove uneconomic since many of these offices are scheduled to be upgraded in the near future. We must consider, however, not only the potential burdens which may be imposed on the LECs, but the interests of the OCCs in utilizing the networks in ways which reflect their individual service provision goals. In balancing those interests, we have concluded that the guidelines set forth in the following paragraph should apply to the provision of terminating WATS access lines in connection with FGA and FGB.[40]

23. The following guidelines shall apply: (1) In end offices converted to equal access, where the OCC elects to use FGA or FGB rather than FGD, on our own motion we will grant a waiver of Sections 69.107 and 69.205 of our Rules to permit the LECs to charge the "LS 2" rather than the "LS 1" premium rate for FGA or FGB service used for terminating 800 Service.[41] The LS 2 rate, if applied, furnishes a reasonable method of compensating the LECs for additional expenses involved in providing FGA or FGB and will encourage the OCCs to consider the efficiencies available through FGD. (2) In unconverted end offices which do not presently have the capability to record FGA and FGB calls, we will require no modifications. We will require no change in the usage surrogates currently in effect for FGA and FGB at unmeasured end offices.[42] (3) For unconverted end offices which have measurement[43] capability at the present time, but which require modification of records to permit accurate billing, we will grant on our own motion a waiver of Section 69.105 of our Rules to permit assessment of CCL charges on WATS calls that use FGA or FGB for a period to expire on February 28, 1987. No such deadline will apply to those offices which do not record FGA and FGB calls.

### C. Service Order Problems

#### 1. Contentions of the Parties

24. Several carriers maintain that due to technical problems they are unable to provide two-way WATS access lines at the present time.[44] Cincinnati Bell asserts that implementation of the service required by the *May 20 Order* will require network rearrangements and procedural changes.[45] The carrier also claims that none of its end office switching entities has the capability of providing two-way WATS service at this time. *Id.* Southwestern states that providing unbundled WATS service will require revisions to ordering, billing, circuit design, and other administrative details.[46] It reports, however, that it has not yet undertaken a detailed analysis of the ramifications of compliance with the Order. US West, on the other hand, reports in its Reply Comments that while the LECs in its region are not currently in a position to implement fully all aspects of the *May 20 Order*, they are in the process of working with the OCCs to effect the necessary changes.[47] During the two-month period after the filing of its petition for reconsideration US West appears to have recognized that there is a market for two-way unbundled WATS service and to have taken steps to meet the demand. *See* US West Reply at 5.

#### 2. Discussion

25. In the *May 30 Order* the Common Carrier Bureau stated that it recognized that some time might be necessary initially to establish the technical capability and provisioning routines necessary to respond to IXC service requests.[48] In order to afford the carriers such additional time the Bureau granted waivers of the standard service order interval to all LECs. *Id.* In addition, the Bureau granted recent requests from Southwestern and Bell Atlantic for extensions of that waiver.[49] In the case of the Bell Atlantic waiver, the Bureau observed that Bell Atlantic had taken steps which demonstrated good faith efforts to overcome technical barriers which limited its ability to comply with this Commission's Orders.[50] The availability of limited waivers upon a showing of good faith efforts to achieve compliance should serve to resolve the service problems identified by the carriers. We conclude therefore that the temporary inability of certain carriers to comply fully with the Bureau's Order does not afford a sufficient basis for reconsideration.

## III. CONCLUSION; ORDERING CLAUSES

26. For the reasons set forth above, we have concluded that none of the claims advanced in the petitions for reconsideration of the *May 20 Order* has any merit.

27. Accordingly, IT IS ORDERED that the above-referenced petitions for reconsideration of the *May 20 Order* ARE DENIED.

28. IT IS FURTHER ORDERED that local exchange carriers which have filed tariffs restricting the provision of WATS access lines to Feature Group C and Feature Group D shall file revised tariffs, on 15 days notice, reflecting the guidelines contained herein no later than 15 days after the release date of this Order.

29. IT IS FURTHER ORDERED that local exchange carriers are granted a waiver of Section 69.105 of the Commission's Rules to permit assessment of Carrier Com-

mon Line charges on WATS calls that use Feature Group A or Feature Group B from end offices unconverted to equal access for a period to expire on February 28, 1987.

30. IT IS FURTHER ORDERED that local exchange carriers are granted a waiver of Sections 69.107 and 69.205 of the Commission's Rules to permit use of the LS 2 rate in calculating the charges applicable from converted end offices for Feature Group A or Feature Group B used for terminating 800 service.

31. IT IS FURTHER ORDERED THAT the Motion to File Reply Out of Time filed by US Sprint Communications Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

**FOOTNOTES**

[1] *See* MTS and WATS Market Structure, Amendment of Part 67, CC Docket Nos. 78-72 and 80-286, Decision and Order, 50 Fed. Reg. 939 (1984).

[2] *See* MTS and WATS Market Structure, Amendment of Part 67, CC Docket Nos. 78-72 and 80-286, Decision and Order, FCC 85-655, released Jan. 7, 1986 (*WATS Direct Assignment Order* ).

[3] *See* MTS and WATS Market Structure, Amendment of Part 67, CC Docket Nos. 78-72 and 80-286, 51 Fed. Reg. 3176 (Jan. 24, 1986) (*Apportionment Order* ).

[4] *See* WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115, released Mar. 21, 1986 (*WATS Access Order* ); MTS and WATS Market Structure, CC Docket No. 78-72, FCC 86-121, released Mar. 21, 1986 (*Account 645 Order* ).

[5] *See* Revision of Part 69 of the Commission's Rules and Regulations, CC Docket No. 85-383, FCC 86-70, released Feb. 6, 1986 (*Comprehensive Filing Order* ).

[6] The telephone industry has traditionally described carriers that offered interexchange services in competition with AT&T as "other common carriers" or "OCCs."

[7] Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, Mimeo No. 4621, released May 20, 1986 (*May 20 Order* ).

[8] *See May 20 Order* at para. 14.

[9] Wide Area Telecommunications Service (WATS) is a bulk-rated offering of switched long distance service. A "WATS access line" is a dedicated access line from the customer's premises to the LEC's WATS serving office at the closed end of WATS service. The closed end is the originating end of OUTWATS and the terminating end of INWATS (800 service). The term "WATS closed ends" includes any WATS access lines that OCCs may use for services that compete with AT&T's WATS.

[10] The term "WATS Access Line" or "WAL" was used to describe the portion of the line from the end user premises to the end office that normally serves that end user. It corresponds with the portion of the line that was included in the same separations category as subscriber lines prior to our direct assignment decision.

[11] The term "WATS Access Line Extensions" or "WALEs" was used to describe the portion of the line, if any, from the end office that normally serves the WATS customer to the end office that functions as a WATS serving office.

[12] Midyear 1986 Access Tariff Filings, CC Docket No. 86-181, Mimeo No. 4987, released May 30, 1986 (*May 30 Order* ), at para. 22. The *May 30 Order* also clarified that the *May 20 Order* did not preempt any state restrictions on the provision of intrastate services. *See* para. 23, *infra*.

[13] Parties requesting reconsideration are listed in Appendix A. The United States Telephone Association (USTA), the GTE Telephone Operating Companies (GTOCs) and the National Association of Regulatory Utility Commissioners (NARUC) filed comments in support of the petitions. Oppositions were filed by MCI Telecommunications Corporation (MCI), ALC Communications Corporation (ALC), and US Sprint Communications Company (US Sprint). US Sprint also filed, on July 25, 1986, a Motion to File Reply Out of Time. US Sprint's motion is granted. In addition, ALC filed, on June 9, 1986, an Emergency Petition for Interim Relief, asking that the Commission impose an interim rate on WATS-type lines currently in place. ALC's Petition was denied. *See* Midyear 1986 Access Tariff Filings, Emergency Petition for Interim Relief, CC Docket No. 86-181, Mimeo No. 6366, released Aug. 15, 1986.

[14] A "directionality" restriction precludes use of the same access line for originating and terminating traffic. The AT&T WATS (or OUTWATS) and 800 (or INWATS) services have traditionally used separate lines.

[15] Southwestern Bell Telephone Company Emergency Petition for Waiver and/or Reconsideration, filed May 23, 1986 (Southwestern Petition), at 3, 4; BellSouth Corporation Petition for Reconsideration, filed June 5, 1986 (BellSouth Petition), at 4.

[16] 47 C.F.R. § 0.291(h).

[17] BellSouth Petition at 12-14; Petition for Reconsideration of Cincinnati Bell Telephone Company, filed June 19, 1986 (Cincinnati Bell Petition), at 3.

[18] ALC Opposition to Petitions for Reconsideration and/or Clarification, filed July 10, 1986 (ALC Opposition), at 7. *See also* MCI Opposition to Petitions for Reconsideration, filed July 10, 1986 (MCI Opposition), at 10-11.

[19] 47 C.F.R. § 0.291.

[20] This Commission has indicated that this delegation of authority extends in the tariff area even to matters which raise "novel questions." *See AT & T Co.*, Tr. No. 13533, 83 FCC 2d 310, 311 (1980).

[21] Section 201(b), 47 U.S.C. § 201(b).

[22] *See* National Assoc. of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972).

[23] *See, e. g.*, US West Petition at 2, 3; SNET Petition at 2; Cincinnati Bell Petition at 2, 4; BellSouth Petition at 2.

[24] BellSouth Petition at 2.

[25] *See, e. g.*, US West Petition at 4.

[26] Pacific Bell and Nevada Bell Petition for Clarification or Partial Reconsideration, filed June 19, 1986 (Pacific Petition) at 4. Feature Group C (FGC) service provides 1+ or no-digit dialing to American Telephone and Telegraph Company (AT&T) only. It is being discontinued at end offices converted to equal access and replaced by Feature Group D (FGD). FGD has transmission quality equivalent to FGC and provides 1+ dialing to a presubscribed carrier and 5-digit dialing to other IXCs. Feature Group A (FGA) and Feature Group B (FGB) do not provide the same features and require the use of 9 to 23-digit access codes.

[27] ALC Opposition at 11; MCI Opposition at 4; US Sprint Opposition at 3-4.

[28] US Sprint Opposition at 4.

[29] US West Reply, filed July 24, 1986 at 6-7.

[30] Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 934 (1984).

[31] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 97 FCC 2d 1082, 1265 (1984).

[32] We are concerned with statements made by both ALC and MCI in their oppositions which imply a contrary conclusion. *See* ALC Opposition at 10; MCI Opposition at 10. The record in this reconsideration proceeding does not indicate whether any state requires LECs to perform blocking and screening as the mechanism for implementing state commission policies, or whether all states leave that responsibility with the affected IXCs, as US Sprint and US West appear to suggest. The LECs may, of course, continue to block and screen for local calls from WATS access lines.

[33] *See* MCI Opposition at 12-13.

[34] *See* AT&T Communications, CC Docket No. 85-326, FCC 85-584, released Nov. 7, 1985, *petitions for recon. pending* (*Megacom Order* ).

[35] *See* Pacific Bell Tariff F.C.C. No. 128, Tr. No. 1190, Memorandum Opinion and Order, released Oct., 1986.

[36] *See* MCI Opposition at 13 n.21.

[37] *See, e. g.*, BellSouth Tariff F.C.C. No. 1, Tr. No. 32, filed Sept. 26, 1986; GTOC Tariff F.C.C. No. 1, Tr. No. 160, filed Sept. 17, 1986; NECA Tariff F.C.C. No. 1, Tr. No. 155, filed July 28, 1986.

[38] *See May 20 Order* at paras. 6-14.

[39] This does not require that standard 10-digit 800 service be offered on originating FGA and FGB lines.

[40] Carriers which have previously filed tariffs which provide for WATS access lines only in connection with FGC and FGD must file, not later than 15 days after the release date of this Order, revised tariffs reflecting the guidelines set forth herein. *See* n. 37, *supra*.

[41] "LS 1" consists of local dial switching for services other than MTS, WATS and services receiving access to the local switch equal to that received by MTS and WATS. "LS 2" consists of local switching services of MTS, WATS, and services receiving access to the local switch equal to that provided MTS and WATS. 47 C.F.R. § 69.107(b).

[42] *See* National Exchange Carrier Association, Tr. No. 93, Mimeo No. 1727, released Dec. 31, 1985. OCCs may, if they prefer to be charged on the basis of actual usage rather than assumed usage at the level of the surrogate, order trunking via WALEs from an unmeasured office to a measured office.

[43] We define measurement as the creation of automatic message accounting (AMA) tapes.

[44] *See, e. g.*, Southwestern Petition at 4-5; Cincinnati Bell Petition at 5.

[45] *See* Cincinnati Bell Petition at 5.

[46] *See* Southwestern Petition at 4.

[47] US West Reply at 7.

[48] *See May 30 Order* at para. 22.

[49] *See* Midyear 1986 Access Tariff Filings, CC Docket No. 86-181, Mimeo No. 6852, released Sept. 10, 1986 *(Bell Atlantic Waiver Order);* Midyear 1986 Access Tariff Filings, CC Docket No. 86-181, Mimeo No. 6705, released Sept. 3, 1986 *(Southwestern Waiver Order).*

[50] *Bell Atlantic Waiver Order* at para. 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FTCC
MCDONNELL DOUGLAS INTERNATIONAL COMMUNICATIONS CO. File No. I-T-C-87-012

Application for authority to acquire and operate facilities for service to Japan

ORDER, AUTHORIZATION AND CERTIFICATE

dopted: December 12, 1986 Released December 19, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on Oc-ber 20. 1986, by FTCC McDonnell Douglas Interna-onal Communications Co. (FTCC), requests authority to ase and operate satellite and connecting facilities for rect service to Japan. Upon consideration of the ap-ication, IT IS HEREBY CERTIFIED that the present nd future public convenience and necessity require the rovision of direct service to Japan by FTCC.

2. Accordingly, IT IS ORDERED that application File o. I-T-C-87-012 IS GRANTED, and FTCC is authorized :

a. lease from Comsat and operate 31 satellite voice circuits between an appropriate earth station on the west coast of the United States mainland and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Japan furnished by FTCC's correspondent in Japan;

b. lease and operate necessary connecting facilities between the west coast earth station and FTCC's operating offices;

c. use said facilities to provide FTCC's regularly authorized services between the U.S. and Japan and beyond; and

d. subdivide the voice circuits authorized herein in accordance with the Commission's Order and Authorization released October 21, 1983, granting FTCC's application File No. I-T-C-82-250 for blanket authority to utilize multiplexing equipment to derive additional channels from authorized voice-grade circuits.

3. The Commission retains jurisdiction over this matter o reallocate circuits in the satellite system among the arious international common carriers and other autho-ized users as required to insure nondiscriminatory use of, nd equitable access to, the communications satellite sys-em.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between FTCC and its correspondent in Japan, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. The authority granted herein is conditioned on compliance by FTCC and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

7. FTCC shall file quarterly traffic and revenue reports on country-by-country basis within 90 days from the end of each calendar quarter.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

FTCC
MCDONNELL DOUGLAS
INTERNATIONAL
COMMUNICATIONS CO.

| | |
|---|---|
| Application for authority to lease and operate facilities for direct service to Bermuda. | File No. I-T-C-87-018 |
| Application for authority to lease and operate facilities for direct service to Sweden. | File No. I-T-C-87-019 |
| Application for authority to lease and operate facilities for direct service to the Phillippines. | File No. I-T-C-87-020 |
| Application for authority to lease and operate facilities for direct service to Hong Kong. | File No. I-T-C-87-021 |

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: December 12, 1986 Released: December 19, 1986**

By the Common Carrier Bureau:

1. The captioned uncontested applications, filed on October 24, 1986 by FTCC McDonnell Douglas International Communications Co. (FTCC), request authority to lease and operate satellite and connecting facilities for direct service to Bermuda, Sweden, the Philippines and Hong Kong. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Bermuda, Sweden, the Philippines and Hong Kong by FTCC.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-87-018, I-T-C-87-019, I-T-C-87-020 and I-T-C-87-021 ARE GRANTED, and FTCC is authorized to:

a. lease from Comsat and operate one satellite voice circuit between an appropriate east coast earth station and an appropriate satellite over the Atlantic Ocean connecting with a similar circuit between the satellite and an earth station in Bermuda, furnished by FTCC's correspondent in Bermuda;

b. lease and operate one voice circuit between the east coast earth station and FTCC's operating offices;

c. use the facilities in a and b above to provide FTCC's regularly authorized services between the U.S. and Bermuda and beyond;

d. lease from Comsat and operate one satellite voice circuit between an appropriate east coast earth station and an appropriate Atlantic satellite connecting with a similar circuit between the satellite and an earth station in Sweden, furnished by FTCC's correspondent in Sweden;

e. lease and operate one voice circuit between the east coast earth station and FTCC's operating offices;

f. use the facilities in d and e above to provide FTCC's regularly authorized services between the U.S. and Sweden and beyond;

g. lease from Graphnet, Inc. and operate a 2400 bps channel in previously authorized facilities between the U.S. and the Philippines;

h. lease and operate connecting facilities between Graphnet, Inc.'s office in New Jersey and FTCC's office in New York;

i. use the facilities in g and h above to provide FTCC's regularly authorized services between the U.S. and the Philippines and beyond;

j. lease from Comsat and operate three satellite voice circuits between an appropriate earth station on the west coast of the U.S. mainland and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Hong Kong, furnished by FTCC's correspondent in Hong Kong;

k. lease and operate three voice circuits between the west coast earth station and FTCC's operating offices;

l. use the facilities in j and k above to provide FTCC's regularly authorized services between the U.S. and Hong Kong and beyond; and

m. subdivide the voice circuits authorized herein in accordance with the Commission's Order and Authorization released October 21, 1983, granting FTCC's application File No. I-T-C-82-250 for blanket authority to utilize multiplexing equipment to derive additional channels from authorized voice-grade circuits.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between FTCC and its correspondents in Bermuda, Sweden, the Philippines and Hong Kong, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the

Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. The authority granted herein is conditioned on compliance by FTCC and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

7. FTCC shall file quarterly traffic and revenue reports on country-by-country basis within 90 days from the end of each calendar quarter.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GLOBAL ANALYSIS
COMMUNICATIONS LTD. File No. I-T-C-86-146

Application for authority to
establish channels of communication
for provision of INTELSAT Business
Services

**MEMORANDUM OPINION, ORDER AND CERTIFICATE**

**Adopted: December 15, 1986 Released December 19, 1986**

By the Common Carrier Bureau:

1. The Commission is considering an application filed on July 18, 1986, by Global Analysis Communications Ltd. (Global), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to establish channels of communication between the U.S. and INTELSAT satellites for provision of INTELSAT Business Services (IBS). Global states that it will initially utilize earth station facilities of International Relay, Inc. (IRI) in New York City for provision of the proposed services. The application was placed on public notice on July 30, 1986. No comments were received.

2. Global requests the same blanket authority to provide IBS services that we have granted to other carriers.[1] Global has the requisite qualifications to provide IBS service to overseas points where IBS has been introduced. It states that initially service will be provided between the U.S. and London, England. Accordingly to Global, a blanket authority here would be consistent with previous Commission decisions and in the public interest.

3. However, Global Analysis Systems Limited (GAS), a United Kingdom limited company, owns 96.4% of the voting stock of the applicant. GAS, *inter alia*, acts as a data base provider to the international business community. Therefore, Global is a foreign-owned carrier within the definition of such as set forth in *International Competitive Carrier* policies, 102 FCC 2d 812 (1985), *recon denied*, Mimeo No. 36813, released August 7, 1986. Accordingly, Global must be treated as a dominant carrier under the Commission's *International Competitive Carrier* policy and may not be granted blanket authority to provide IBS services. Instead, it must seek Section 214 authority to provide IBS service on a country-by-country, circuit-by-circuit basis. Global may apply in one application to serve more than one country as long as it specifies the requested circuitry to each country. Here, Global has specified circuitry to begin service to the United Kingdom. We will grant Global's application to the extent that it requests IBS facilities for service to the U.K.

4. IT IS CERTIFIED that the present and future public convenience and necessity require the provision by Global of the IBS service to the United Kingdom.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-86-146 IS GRANTED, in part, and Global is authorized to acquire, operate and subdivide one T-1 circuit between a U.S. earth station and an appropriate INTELSAT Atlantic Ocean region satellite for provision of IBS and related digital video services between the U.S. and the United Kingdom.

6. The Section 214 authorization granted herein is effective on its release date of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of its execution.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carries and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. Global shall file quarterly traffic and revenue reports on country-by-country basis within 90 days from the end of each calendar quarter.

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] Vitalink International Communications, Inc., Mimeo No. 687 (released November 7, 1984). See also, Communications Satellite Corporation, Mimeo No. 6564 (released September 14, 1984) and American Telephone and Telegraph Co. *et al.*, File Nos. I-T-C-85-035, et al., released March 18, 1985.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

Marc Weber Wobias &
Michael C. Tobias File No. 25631-CD-AL-01-86
d/b/a MT SYSTEMS,INC.

For Consent to assign stations
WRV288, KKG500,KKG501, KRS617,
KDS478, and WRW288 in South
Dakota to EAST DAKOTA
COMMUNITY DEVELOPMENT CORPORATION

## MEMORANDUM OPINION AND ORDER

**Adopted December 16, 1986; Released December 19, 1986**

By the Common Carrier Bureau:

1. Presently before us is the application for assignment of the captioned radio stations in the Public Land Mobile Service from Marc Weber Tobias and Michael Weber Tobias d/b/a MT Systems, Inc. (MT) to East Dakota Development Corporation (East Dakota or assignee). Midco Answering, Inc. (Midco) filed a petition to deny alleging that the application is defective because the assignee did not file a qualifications report and the application does not have a public interest statement. In addition, Midco alleged that it could not find corporate records for East Dakota. In response, MT alleges the application is complete and in addition it furnishes a qualifications report and a public interest statement. In response to petitioner's allegation concerning East Dakota's corporate status MT states that East Dakota is a non-profit corporation funded by grant from the State of South Dakota.

2. We find that the application as amended is complete and that grant of the application is in the public interest, convenience and necessity.

3. Accordingly, IT IS ORDERED, that the application seeking consent to assign various radio licenses; from Marc Weber Tobias to East Dakota Community Development Corporation, IS GRANTED.

4. IT IS FURTHER ORDERED, that the Petition to Deny filed by Midco Answering Service IS DENIED.

5. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this Order. *See* Section 1.4 (b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin Kelley
Chief, Mobile Services Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

F.C.J., INC. File No. 10191-CL-P-124-A-86
TELEPHONE
COMPANY

For authority to construct and
operate a system in
Domestic Cellular Radio
Telecommunications Service for
Santa Barbara-Santa Maria-
Lompoc, California.
Metropolitan Statistical Area(MSA)

## MEMORANDUM OPINION AND ORDER

**Adopted December 16, 1986; Released December 19, 1986**

By the Common Carrier Bureau:

1. Mission Cellular Radio System (MCRS) filed a petition to dismiss or deny the application of F.C.J., Inc. (FCJ), the tentative non-wireline selectee in the lottery held on April 21, 1986 for the Santa Barbara-Santa Maria-Lomoc, California MSA. Responsive pleadings were filed.

2. MCRS alleges that FCJ is financially disqualified by its failure to submit estimated costs of operating its proposed system for one year in its amendment submitted on July 14, 1986. As a result FCJ contends that MCRS had not submitted sufficient data to determine whether it has received a firm financial commitment to construct and operate its facility pursuant to Section 22.917(b) of the Commission's Rules. Additionally, FCJ argues that MCRS is technically unqualified because Cell No. 1 of the proposed system does not have an adequate number of antennas. FCJ states that this cell plan proposes 23 channels and only one antenna is proposed. Finally, FCJ asserts that the application is further technically defective because it specifies obsolete emission designators contrary to the Commission's prior Public Notices. For these reasons MCRS requests that that the application must be dismissed or denied. The petition is opposed by FCJ.

## DISCUSSION

3. Financial Qualifications. Upon review of the application we conclude that FCJ's application satisfies our firm financial requirements of Section 22.917(b) of the Rules. FCJ's July 14 amendment demonstrated its "anticipated costs of construction and first year of operation as specified in Exhibit 4 of its application". We find that FCJ incorporated those figures by reference and as such complied with our rules. By using those figures, combined with the July 8, 1986, firm financial commitment and supporting data from Mitsubishi Electric America, Inc., we conclude that FCJ is financially qualified.

4. Number of Antennas. MCRS's assertion that FCJ is technically unqualified is also without merit. The Commission's rules do not require a specific ratio of antennas to channels in a cell. Even if FCJ were proposing just one antenna in Cell No. 1, its application would be in compliance with the rules. However, FCJ is proposing two antennas. Exhibit 9 of the application states " channels are grouped into sets, with the adjacent channels of each set spaced 21 channels apart. Only channels from a given set are fed to the same transmitting antenna". Also this exhibit indicates that no more than fifteen voice channels are assigned to any one set, as specified in Table 9-4. Based upon our analysis of this exhibit and the pleading filed we find that FCJ is technically qualified. *See Personal Telephone Co. of Savannah, Inc.*, DA 86-164, released November 6. 1986.

5. Emission Designators. Additionally, there is no merit to MCRS argument that FCJ has used obsolete emission designators. The November 5, 1985, Public Notice relied upon by MCRS merely notified the public that the Mobile Service Division (MSD) would begin to issue authorizations with the new emission designators, and did not require any actual changes to a licensee's equipment. *See Johnstown Cellular Communications, Co.*, DA 86-334, adopted December 9, 1986. Although Form 401, which is utilized for MSD filings, specifies the entry of emission designators data, this data is not incorporated into cellular construction permits and licenses, as it is for non-cellular applications. Accordingly, we conclude that the emission designation data submitted by FCJ complied with our rules.[1]

## ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED That the Petition to Deny or Dismiss filed by the Mission Cellular Radio System IS DENIED.

7. IT IS FURTHER ORDERED That the application of F.C.J., Inc., File No. 10191-CL-P-124-A-84 IS GRANTED effective on the release date of this Order. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission.

8. IT IS FURTHER ORDERED, That all other non-wireline applications in this market ARE HEREBY DISMISSED.

9. This Order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this Order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

## FOOTNOTES

[1] The staff of the MSD has consistently advised the public that either the old or new set of emission designators was acceptable. *Id. See also Personal Telephone Company of Savannah, Inc., supra* at para. 6.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re applications of

| | |
|---|---|
| MOBILE COMMUNICATIONS OF AMERICA | File No. 29646-CL-TC-1-86<br>File No. 29647-CL-TC-1-86 |

For Consent to Transfer Control
of Houston and Los Angeles Cellular
Telephone Co. to Bellsouth Corp.

**MEMORANDUM OPINION AND ORDER**

**Adopted December 16, 1986; Released December 19, 1986**

By the Chief, Mobile Services Division:

**BACKGROUND**

1. Before the Commission are the applications for transfer of control of Los Angeles Cellular Telephone Company and Houston Cellular Telephone Company (LACTC, HCTC) from American Cellular Communication Corporation (ACCC) to BellSouth Corporation (BellSouth). BellSouth is one of the Regional Holding Companies created to facilitate the reorganization of American Telegraph and Telephone Company as required by the consent decree issued by the United States District Court for the District of Columbia (MFJ). *See generally, United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 135-40 (D.D.C. 1982), *aff d sub nom., Maryland v. United States*, 460 U. S. 1001 (1983). BellSouth, through subsidiaries, provides local and toll telephone exchange service in the states of Alabama, Kentucky, Louisiana, Mississipi, Tennessee, Florida, Georgia, North Carolina and South Carolina. BellSouth Mobility Inc., a wholly owned subsidiary of BellSouth, operates wireline cellular mobile telephone systems in Atlanta, Georgia; Baton Rouge and New Orleans, Louisiana; Birmingham, Alabama; Chattanooga, Memphis and Nashville, Tennessee; Jacksonville, Miami/Ft. Lauderdale, Orlando and West Palm Beach, Florida and Louisville, Kentucky.

2. Mobile Communications Corporation of America (MCCA), the parent company of ACCC, is a communications holding company, engaged, through subsidiaries, in providing paging service, conventional and cellular mobile telephone service, air-to-ground telephone service, inland marine telephone service and telephone answering services. MCCA serves customers in 93 cities in 24 states and the District of Columbia. The stock of MCCA is publicly traded over the counter. MCCA indirectly (through second and third tier subsidiaries), holds roughly a 60% equity interest in LACTC. MCCA (through subsidiaries), holds roughly a 50% interest in HCTC.

3. The proposed acquisition involves the transfer of a portion of MCCA's interest in LACTC and HCTC to BellSouth as part of a more comprehensive plan for sale to BellSouth of newly issued common stock of MCCA and tranfer to BellSouth of interests in other cellular telephone enterprises owned by MCCA.[1] The management of ACCC and the Cellular Partnership will be governed by the provisions of a Shareholder's Agreement (as to ACCC) and a Partnership Agreement (as to the Cellular Partnership). The Board of Directors of ACCC and the Partners' Committee of the Cellular Partnership will each have seven members, four of which will be nominated by BellSouth and three by MCCA. The Shareholders' Agreement and the Partnership Agreement will require the unanimous vote of the respective governing boards of ACCC and the Cellular Partnership in order to approve certain fundamental decisions.

4. The transaction will result in the transfer to BellSouth of a 30% equity interest and a measure of influence over the management of LACTC.[2] ACCC currently has a 60% equity interest and 50% voting interest in LACTC, upon execution of the acquisition, one-half of ACCC's interest, a 30% equitable and 25% voting interest, will be held by BellSouth with the remaining one-half being held by MCCA. In Houston, ACCC currently has a 50% equity and voting interest of HCTC. Upon execution of the proposed acquisition, one-half of that interest, (25%) will be held indirectly by MCCA and the other half by BellSouth.

**Petition to Deny And Informal Comments**

5. GTE Mobilnet Inc. (GTE) filed a petition to deny the Houston application. GTE is the parent corporation of the general partner of GTE Mobilnet of Houston Limited Partnership, (GTE-Houston) which operates the wireline cellular system in Houston. GTE alleges the applications should not be granted because the transferor, contrary to what is stated in the application,is not ACCC, but MCCA. The transfer is not in the public interest, convenience and necessity, according to GTE, since the applicant did not file the required public interest statement. In addition, GTE maintains that the transferee has failed to show that it is financially qualified, as required by Section 22.917(d) of the rules. Moreover, according to GTE, there is some doubt about the economic stability of the system since it has only been operating for two months. Applicants have failed to disclose subsidiaries and affiliates as required by the rules according to GTE. Moreover, GTE alleges that a partial transfer of cellular facilities (since the applicant is only transferring 20 of 29 locations of an integrated cellular system) raises unresolvable questions of control. Finally, GTE contends that the applicants have not made a full disclosure as required by Commission rules. According to GTE, the applicants failed to disclose an option for BellSouth to acquire MCCA stock in addition to the 15% discussed in the application. In addition, GTE maintains that there are indications of advanced funding by BellSouth without settled payback terms, which could violate prohibitions against premature transfer of control, GTE maintains. In the alternative, GTE requests that if the transfer is permitted, it should be conditioned on BellSouth agreeing to assume a passive investor role with respect to the Houston system because GTE and BellSouth are partners in some markets and competitors in other (GTE is the competitor

of HCTC in Houston; GTE is also a limited partner in the Atlanta and Lexington cellular markets in which the wireline system is controlled by BellSouth).[3]

6. Lin filed informal objections to the applications. The applications do not provide sufficient information for the Commission to make the required determination as to whether the proposed tranfers would serve the public interest, according to Lin.[4] Furthermore, according to Lin the applications provide no information of where BellSouth is going to acquire the necessary funding for the purchases, raising questions about whether ratepayers are subsidizing BellSouth's entry into competitive cellular markets. In addition, Lin maintains that the transfers proposed here may significantly hamper the ability of nonwireline cellular licensees to provide interexchange and voice storage services on an efficient basis to their customers if they are construed to be BOC's. According to Lin, the Commission should take cognizance of this possibility in assessing whether grant of the applications would serve the public interest and, if so, whether conditions should be imposed on BellSouth's participation in the management of LACTC and HCTC, in order to reduce the likelihood that those entities would be subject to Modified Final Judgement (MFJ) restrictions. In reply comments Lin additionally maintains that a correct interpretation of the fence requirement requires denial of the transfer applications.[5]

7. BellSouth and ACCC, jointly (BellSouth) filed an Opposition to the Petition to Deny filed by GTE. First, BellSouth contends it has complied with Commission rules and submitted all the required information. BellSouth alleges that it is clear that any control that is transferred is from ACCC to BellSouth and not from MCCA to BellSouth. Although it is true that MCCA will transfer the stock of ACCC to BellSouth, BellSouth is not obtaining control of more than 50% of the stock of either ACCC or HCTC, BellSouth maintains. ACCC is the holding company for cellular radio interests and owns the equity interests in the cellular market, maintains BellSouth. Moreover, BellSouth will appoint four out of seven directors of the Board of ACCC, not MCCA. Although BellSouth claims it complied with the public interest statement by having filed the necessary forms, it nevertheless filed an amendment containing a public interest statement and demonstrating BellSouth's financial qualifications. Moreover, BellSouth claims that as further evidence of its good faith it provided an amendment listing its subsidiaries and affiliates. Finally, BellSouth alleges there has been no premature transfer of control of HCTC to BellSouth. BellSouth has exercised no control over HCTC whatsoever and will not do so until the transfer of control is approved and the transaction is closed. Additionally, BellSouth contends that imposition of a condition on it as requested by GTE is inappropriate, since GTE only has access to limited information where it is a limited partner and since it is a passive investor in these markets. Therefore, BellSouth states, the flow of competitively sensitive information is already sufficiently restricted without the necessity of imposing further restrictions on BellSouth. Finally, BellSouth denies the allegations made by GTE regarding the potential risk of transfer of competitive information and maintains that this is not the appropriate proceeding to resolve such allegations.[6]

8. In response to Lin's informal comments ACCC alleges that no specific rule requires the submission of the underlying agreements to the transaction. According to ACCC the parties complied with the rules requirements. ACCC also maintains that Lin's assessment of BellSouth's funding commitment is misleading. ACCC maintains, BellSouth is acquiring 50% of ACCC's stock for $33.3 million and that this is the only commitment relevant to the Commission's consideration.[7] In response to Lin's allegations that BellSouth's ratepayers may subsidize the proposed transaction, ACCC maintains that (1) out of region acquisitions of nonwireline cellular interests by RHC's are permitted by the Commission; (2) that BellSouth is subject to the Commission's separate subsidiary requirements; and (3) that its future cellular operations can be monitored by the Commission, state and federal agencies, and the judiciary. Under these circumstances, ACCC maintains, unwarranted and unfounded concerns that BellSouth may cross-subsidize its cellular operations should not impede grant of the subject applications. Whether BellSouth will acquire more interests in MCCA or a seat on its Board is irrelevant to the transfer applications at issue in this case, ACCC maintains. Moreover, according to ACCC, it is also insignificant that BellSouth has made loans to ACCC. In the absence or any evidence that BellSouth is dominating ACCC's corporate affairs, the fact that BellSouth has advanced funds to ACCC in contemplation of their joint venture does not evidence a transfer of control.[8] Finally, ACCC maintains that a determination of whether LACTC and HCTC will be transformed into BOCs within the meaning of the MFJ does not warrant the submission of additional information, because this issue is ultimately for the MFJ Court to resolve. Moreover, according to BellSouth, the fact that LACTC and HCTC may arguably be treated as BOCs will not significantly hamper the licensee in the provision of cellular service as Lin maintains.

## DISCUSSION

9. We find the captioned applications are in the public interest and will be granted. Lin and GTE have failed to convince us otherwise. We disagree with both Lin and GTE that the application fails to provide sufficient information for us to make an informed decision. BellSouth has provided us with sufficient and adequate information, with the amendments to its application and forthright responses to the pleadings.

10. GTE's and Lin's contentions concerning BellSouth's financial capabilities are without merit.[9] BellSouth's current balance sheet shows stockholders' equity in excess of $11 billion, or more than 75 times the total amount of funds BellSouth will pay or loan ACCC and MCCA. Moreover, as BellSouth points out, it is operating within the limits of its capitalization plan and will continue to be within the limits of that plan upon the closing of its transaction.[10] In addition, the separate subsidiary requirement acts as a deterrent to cross-subsidization. *See* Section 22.901 of the rules.

11. We agree with BellSouth that no premature transfer of control has taken place. Although BellSouth has indeed loaned money to ACCC, this alone is not sufficient grounds to infer a premature transfer of control. Absent any evidence of any additional indicia of control, Lin has failed to raise a substantial question of fact concerning this matter. Moreover, there is uncontested evidence by BellSouth that it is not exercising control. *See* affidavit of

M. L. Campbell, fn. 8 *supra*. The involvement in a licensee's affairs beyond a mere debtor-creditor relationship is necessary before a finding of premature control can take place. *See George E. Cameron*, 52 Rad. Reg. 2d 444 (P&F)(1982); *Gulf Coast Communications, Inc.*, 48 Rad. Reg. 2d 859 (P&F)(1980).[11]

12. Finally, we will not impose a condition on HCTC, as requested by Lin. The Commission in approving the transfer of control of Communications Industries, Inc. to Pacific Telesis Inc. held that the set- aside was an application processing tool and that it would not limit alienation rights of parties by artificially extending the duration of the fence. *See James F. Rill*, FCC 86-251, released May 27,1986.[12] In the *Rill Order*, the Commission originally imposed a condition on Pacific Telesis fearing there would be information flow problems. The Commission subsequently removed the condition. *See James F. Rill*, 86-520. released November 28, 1986. For the reasons stated in that Order we will not impose a condition in this case.

13. We find BellSouth qualified to hold the licenses involved in these transfers. We also find that approving these transfers, whereby BellSouth is acquiring effective control over ACCC and will in turn exercise negative control over HCTC and LACTC, is in the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, that the applications filed by BellSouth and ACCC, ARE GRANTED.

15. IT IS FURTHER ORDERED, that the petition to deny filed by GTE Mobilnet and the informal comments filed by Lin Cellular Company ARE DENIED.

16. This Order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

## FOOTNOTES

[1] The purchase agreement provides that BellSouth will purchase from MCCA: one million shares of Class A Common stock and two million shares of Class B Common stock, approximately 15% of the combined voting power of the outstanding shares of common stock of MCCA, for a purchase price of $40,500,000; 1,875,000 shares of ACCC or 50% of the outstanding common stock of ACCC, for a purchase price of $33,300,000; and all of the issued and outstanding shares of common stock of a wholly-owned subsidiary of MCCA. Augusta Cellular Corp. which owns a 50% equity interest in a general partnership (the Cellular Partnership), for a purchase price $30,000,000. *See* Application of BellSouth pursuant to Section 854 of the Public Utilities Code, before the Public Utilities Commission of the State of California.

[2] LACTC is a general partnership owned 65% by Los Angeles Cellular Corporation (LACC). MCCA, through various subsidiaries, holds a 92% equity interest in LACC. Lin Cellular Communications Corp. (Lin) is a 50% co-equal voting partner in LACTC and HCTC. Lin has a 35% equity interest in LACTC and a 50% equity interest in HCTC.

[3] A petition was also filed by Cellular Marketing Inc. but was withdrawn by petitioner. We have reviewed the pleading and find that the contentions albeit couched in terms of anticompetitive practices essentially involve a contractual dispute between the parties. We believe there are more appropriate forums to resolve these problems. The Lawrence Communication Co. filed a letter alleging it has serious questions regarding the effect that this transfer will have on its income and participation in the Houston MSA, since both systems would be controlled by wireline companies. This company's comments have failed to raise a substantial question of fact concerning the transfer of control applications.

[4] Lin alleges that according to MCCA's SEC filings (1)BellSouth already has advanced MCCA at least $6 million in connection with some of the cellular transactions contemplated in the Purchase Agreement; (2) BellSouth already has loaned MCCA over $106 million in connection with the acquisition of ACTC stock; (3) BellSouth may make further loans prior to consummation of the transactions contemplated in the Purchase Agreement; (4) BellSouth is to acquire representation on MCCA's Board of Directors; and (5) BellSouth apparently will acquire an option to obtain an additional 15% of MCCA stock under certain circumstances.

[5] Lin reiterates its argument that BellSouth should be required to provide the Commission with the purchase and other agreements, since it has not revealed them even to Lin, a partner in the systems.

[6] Pacific Telesis filed a Motion for Leave to File Comments and Comments opposing GTE's request that the Commission impose a condition on BellSouth limiting its participation in Houston, alleging that there is no valid rationale for imposing such a condition. Pacific's motion is granted.

[7] ACCC states that BellSouth has assets of $25 billion.

[8] BellSouth submitted an affidavit attesting to the fact that it has made no effort whatsoever to exercise any control over the policies and operations of ACCC or any of its subsidiaries or affiliates. Affidavit of M. L. Campbell.

[9] GTE's other contentions are without merit. Any defects contained in the application have been cured by BellSouth's filings. GTE's allegation concerning the appropriate transferor is also without merit, since,in any case, the application was in fact signed by an officer of MCCA, according to BellSouth.

[10] In addition, BellSouth did in fact file a request for an interim increase in its capitalization plan, up to $227 million, which it alleges will cover its capitalization requirements to consummate the instant transaction. This interim modification was approved by the Commission. *See BellSouth Request for Increase in Capitalization Level For Cellular Radio Services*, AAD-6-1547, DA86-155, released November 7, 1986.

[11] The stock option to acquire additional stock of MCCA is irrelevant to our analysis of the current transaction. We also find that the concerns relating to whether HCTC and LACTC would be limited by the MFJ are more properly addressed to the MFJ Court.

[12] Lin alleges that grant of the transfers in this case would violate the Commission's set aside policy. This can only be interpreted as an untimely petition for reconsideration of the

*Rill Order, supra.* As such Lin's arguments must be dismissed. Moreover, Lin has not shown any reasons why these transfers would not be in the public interest.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

## PUBLIC NOTICE

**Released: December 12, 1986**

## FREEZE IMPOSED ON FILING OF APPLICATIONS FOR NEW AM DAYTIME STATIONS

Over the last several years, the Commission has repeatedly recognized the need for extensive modifications in our AM policies and rules governing such broadcasters. *See Report on the Status of the AM Broadcast Rules*, (Submitted to the Federal Communications Commission, prepared by the staff of the Mass Media Bureau, April 3, 1986). The difficulties facing AM daytime stations are compounded by the limitations on their hours of operation and the attendant inability to effectively compete with full-time radio broadcasters. In this regard, the Commission has adopted procedures which make it possible for many existing AM daytime stations that operate on foreign clear channels to broadcast with limited power at night. *In re Nighttime Operation on Canadian, Mexican and Bahamian AM Clear Channels* (MM Docket 84-251), 58 RR 2d 655 (1985), reconsideration granted in part, denied in part, 59 RR 2d 1187 (1986). However, applicants proposing new AM daytime stations are not permitted to apply for these foreign clear channels because such proposals could preclude the establishment of full-time stations on these channels and/or impede our efforts to provide relief for existing daytime stations.

For these same reasons, we believe that the restrictions on filing applications for new AM daytime stations with respect to foreign clear channels should apply to all channels in the AM band. In continuing to authorize new AM daytime stations we not only complicate the task of offering relief to such existing stations, but we also perpetuate the very problem we are seeking to address. Moreover, we believe that it is in the public interest to restrict future applicants to proposing full-time operation since this generally results in more efficient use of scarce spectrum space.

Accordingly, until further notice we are imposing a temporary freeze on the acceptance of applications for new AM daytime stations received after the adoption date of this Public Notice. This action is taken in contemplation of a formal rulemaking proceeding to propose a permanent ban on acceptance of applications for new AM daytime stations. Applications for new daytime stations on file before the adoption date of this Public Notice and applications filed after the adoption date that are mutually exclusive with applications listed on an "A" cut-off list shall be processed as usual. This action will not restrict the ability of existing AM daytimers to apply to modify their facilities.

Action by the Commission December 11, 1986 (FCC 86-541). Commissioners Fowler (Chairman), Quello, Dawson, Patrick and Dennis.

For further information, please contact Leonore Cunningham at (202) 632-6485.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Ameritech Operating Companies Transmittal Nos. 39 and 48
Tariff F.C.C. No. 2

**ORDER**

**Adopted: December 10, 1986; Released: December 12, 1986**

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by the Ameritech Operating Companies (Ameritech) on November 14 and December 10, 1986, and are scheduled to become effective on December 13, 1986. By these revisions, Ameritech clarifies tariff language pertaining to billing disputes and provides for the payment of refunds and interest if a customer has been overcharged because of a billing error. According to these revisions, interest will be paid from the date of overpayment until the time of the the refund, if the customer submits a claim for refund within six months of the "payment date"[1] and the claim is resolved in the customer's favor. Currently, according to Ameritech, interest on overpaid amounts is paid only from the tenth day after the day on which the customer files a claim of overbilling. The proposed six month limit applies only to the right to receive interest on an overpayment and not to the refund of the overpayment itself.

2. MCI Telecommunications Corporation (MCI) filed a petition to investigate Transmittal No. 39. MCI asserts that the term "payment date" should be clarified for these purposes to refer to the date of actual payment. MCI further argues that the tariff should provide for interest on overpayments even if the customer files a claim more than six months after the payment date. According to MCI, the failure to provide interest for funds held due to incorrect billing is unjust and unreasonable and in violation of Section 201(b) of the Communications Act[2] (the Act), regardless of when a claim was filed within the two-year limit of Section 415 of the Act.[3] Furthermore, MCI argues, the continued application of interest is essential to preserve the customer's right to receive interest on refunds if backbilling in future months has created a dispute for bills rendered more than six months earlier.

3. In its reply, Ameritech states that adopting MCI's proposal that "payment date" refer to the date on which payment is due would allow a customer to extend payment of a bill indefinitely and still qualify for a refund with interest on an overpayment. Ameritech argues that requiring a customer to pay a bill and submit a claim within six months of the date the payment was due is reasonable and provides ample time for a customer to verify bills. Ameritech notes that Section 415 of the Act is silent on the issue of interest and does not provide for remedies, but rather, limits them. Thus, Ameritech argues, the six-month limit on filing claims to receive interest on overpayments does not violate the Act because the Act does not require Ameritech to pay any interest on any claims filed within the two-year limit of Section 415. Moreover, Ameritech asserts, limiting interest to customers who file a claim within six months provides an incentive for customers to inspect their bills and make claims in a timely manner. Finally, Ameritech states, the right to interest in backbilling situations would accrue within six months from the payment date of the new bill, and not from the dates of prior bills.

4. The Common Carrier Bureau has reviewed the proposed tariff and the pleadings. We conclude that there is not sufficient likelihood that the tariff revisions would be found unlawful to warrant investigation at this time.

5. Accordingly, IT IS ORDERED that the petition filed by MCI Telecommunications Corporation against the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 39, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] The "payment date" is defined in Section 2.4.1 (B)(3)(a) of Ameritech Tariff F.C.C. No. 2 as the date on which payment is due.

[2] 47 U.S.C. § 201(b).

[3] 47 U.S.C. § 415.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: December 15, 1986**

**Effective Date for Use of New Metric AM Groundwave Curves Deferred Until February 1, 1987 Curves and Related Materials Now Available**

The FCC has deferred, to February 1, 1987, the effective date for use of the new AM metric groundwave curves in Section 73.184 of the Commission's Rules. They must be used for all studies filed on or after that date. Owing to delays in steps needed to make those curves and related materials available, there is insufficient time to enable users to employ them for studies filed on or after the previously established effective date of January 1, 1987. Access to negatives of the curves and associated graph paper will be arranged for entities interested in printing these materials for sale.

A source listing of the computer program employed in calculating the points used in plotting the curves, and an approximately 650-page listing of those calculated points for use in "look up" tables, may be obtained from the Commission's contractor for public records duplication, International Transcription Services, Suite 140, 2100 M Street, NW., Washington, DC 20036; telephone (202) 296-7322.

For further information, please contact Mr. William Meintel at 1919 M St., N.W. Washington, D.C. 20554; telephone (202 254-3394.

FEDERAL COMMUNICATIONS COMMISSION

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U.S. GOVERNMENT PRINTING OFFICE:1987-181-195/60005